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Due to space limitations, many matters are reported upon more briefly than their importance deserves. The JOURNAL, upon request, will furnish full texts or source material whenever these are available.

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NOTE: The editors are pleased to announce that commencing with the Spring issue of the ARBITRATION JOURNAL the editorial content will once again embrace a larger measure of Notes and News, Reviews of Court Decisions, Publications and Documentation, which sections had to be curtailed during 1948 due to space limitations.

Should People Learn to Hate Disputes?

The reason people hate war and are for peace is that for centuries they have had before them in history, drama, art, music and economics, the horrors of war. They know its high cost in men and materials within the scope of their own human relations. They have ever before them the personal fear of war and they are beset by warnings against it. They learn in a thousand different ways, its cost to themselves and to their country. For the most part their feeling is directed to the results of war rather than to an examination of causes.

This fact leads to speculation as to why people do not hate disputes which are admittedly one of the outstanding causes of war. Unsettled differences or unjustly settled differences or disputes can be counted upon not only to foment war, but under modern conditions of psychological or cold warfare they offer a seed bed for the propagation of the unrest and enmities that advance warfare.

Under these circumstances why has arbitration played so small a part in averting war? It is difficult to urge a remedy when there is no consciousness of illness, or to urge a right when there seems to be no wrong. Such efforts do not reach into the human relations of the people. Arbitration must, therefore, travel an uphill road until people begin to realize the high cost of disputes, the toll they take in property, lives and happiness. The people must somehow come to hate disputes and hating them, be moved to examine them and if they find them dangerous, do something about their control and reduction in civilized society.

People hating cancer and polio and tuberculosis, are moving into coordinated action to control them through understanding their causes and growth. People hating war are moving into coordinated action to control its outbreak. But people more or less tolerating, if not actually enjoying, disputes, are not yet awake to their ultimate effect upon civilization—an effect no less disastrous generally to society than are other dangerous diseases to individuals and public health.

"Next to war," said a Bulletin of the U. S. Department of Commerce, "commercial litigation is the largest single item of preventable waste in civilization."

If this be so, then coming to grips with this problem is a belated act toward civilization.

The International Business Relations Council

Review of Activities for 1948

H. L. Derby*

The International Business Relations Council of the American Arbitration Association has an administrative organization in the United States, comprising 97 members, officers, an Executive Committee and seven Advisory Committees. It has 163 active International Trade Arbitration Correspondents in 60 cities in 39 countries outside of the Western Hemisphere who keep the Council supplied with the latest information on arbitration laws and practice, on trade regulations and conditions that are likely to create disputes.

The Council has advanced cooperative arrangements between the American Arbitration Association and organizations in foreign countries that give both American and foreign business men arbitration facilities and services in all countries. It has also advanced the use of joint arbitration clauses under which American business men are encouraged to use their own arbitration facilities in the United States as well as those in other countries.

The Council is encouraging the consolidation of arbitration facilities and services in each country so American and foreign traders may clear their differences and disputes expeditiously through one central agency, under the multiple and continuous contracts which are generally used in international trade.

Education in the use of facilities in the United States and in other countries is proceeding expeditiously by way of exchange of information, distribution of American publications and through conferences and communications designed to establish a mutuality of interest and better business relations.

The part that business can take, through arbitration in trade relations, toward the maintenance of international peace and security has been emphasized in the cooperation of the Council with the American Government, with foreign agencies in the United States and through international official agencies.

The Council has also cooperated closely with the Business Relations Committee of the Inter-American Commercial Arbi-

* Chairman, International Business Relations Council.

tration Commission which performs similar services for the American Republics.

ORGANIZATION OF THE COUNCIL IN THE UNITED STATES

The Council is the educational, research and coordinating agency of the American Arbitration Association for the advancement of world arbitration, by which is meant the encouragement of the pacific settlement of economic disputes in all countries, and among nations, through their contractual relations.

The Council is not an arbitration tribunal. It maintains no facilities or services, no panels of arbitrators and no machinery for the settlement of specified disputes. If disputes are referred to it, these are cleared to the appropriate organization that maintains arbitration facilities and services.

It does, however, facilitate arrangements by which the American Arbitration Association and organizations in different countries establish facilities and services which such organizations jointly operate.

It is interested in bringing together the various agencies and organizations, now scattered throughout the world, in a common undertaking to advance arbitration as an instrumentality in the permanent organization of a peaceful world society.

As presently organized, the Council is composed of 97 American business and professional men. It is increasing its membership to include representatives of foreign firms who are resident in the United States. Its officers comprise a Chairman, three Vice Chairmen, an Executive Member, a Secretary and a Public Relations Director.[1] These officers, together with the Chairmen of the Advisory Committees, constitute the Executive Committee. The Advisory Committees include the following: World Arbitration, Sylvan Gotshal, Chairman; Commercial Organizations, Morris S. Rosenthal, Chairman; Public Interest Organizations, William H. Baldwin, Chairman; International Trade Correspondents, Eugene F. Sitterley, Chairman; Public Information, Robert W. Sarnoff, Chairman; Research and Education, Dwayne Orton, Chairman; Law and Procedures, for which the Chairman has not as yet been appointed. These Committees constitute an efficient and indispensable body of consultants in a complex and troubled economic world.

[1] Chairman: H. L. Derby; Vice Chairmen: Spruille Braden, James H. Drumm, Robert J. Lynch; Executive Member: Frances Kellor; Secretary: F. V. Church; Public Relations Director: Donald L. Ferguson.

The work of the Council is financed as an integral part of the American Arbitration Association, through international memberships in the Association and through special contributions to the Association. It has an executive staff of seven persons who give full or part time to its work.[2] This staff meets weekly to plan and develop the work of the Council.

ORGANIZATION OF THE COUNCIL OUTSIDE OF THE UNITED STATES

The Council is organized outside of the United States through International Trade Arbitration Correspondents and Advisors who are the representatives of American business and professional organizations in the United States. They have been nominated by their respective companies and organizations, and have then been appointed by the Council. Their duties and responsibilities which are fixed by the Council, are to furnish information, to advance good business relations between Americans and foreign traders, to facilitate the settlement of trade disputes through the use of arbitration clauses in contracts or through the adjustment of misunderstandings or differences, and to keep the Council advised of conditions that may adversely affect good international trade relations. The distribution of these Correspondents follows:

Algeria: Algiers; *Arabia:* Aden; *Australia:* Adelaide, Brisbane, Melbourne, Sydney; *Bahama Islands:* Nassau; *Belgium:* Brussels; *Burma:* Rangoon; *Ceylon:* Colombo; *China:* Hong Kong, Shanghai; *Czechoslovakia:* Prague; *Denmark:* Copenhagen; *Dutch Guiana:* Paramaribo; *Egypt:* Cairo; *England:* Birmingham, London; *Finland:* Helsinki; *France:* Paris; *Hawaii:* Honolulu; *Holland:* Aerdenhout, Amsterdam, Beerzerveld, Rotterdam, Veendam; *India:* Bombay, Calcutta, New Delhi; *Ireland:* Dublin; *Italy:* Genoa, Milan; *Japan:* Tokyo; *Java:* Batavia; *Lebanon:* Beyrouth; *Luxembourg:* Mersch; *Malay Peninsula:* Singapore; *Morocco:* Tangier; *Netherlands West Indies:* Curacao; *New Zealand:* Auckland, Wellington; *Norway:* Oslo; *Palestine:* Haifa; *Philippine Islands:* Manila; *Portugal:* Lisbon; *Scotland:* Glasgow; *Siam:* Bangkok; *South Africa:* Capetown, Durban, Johannesburg, Port Elizabeth;

[2] The executive staff consists of the following members of the staff of the American Arbitration Association: George N. Butler, Director of the International Department; F. V. Church, Administrative Assistant to the First Vice President; Martin Domke, International Vice President; John Eastman, Jr., Director of Regional Offices; Donald L. Ferguson, Director of International Public Relations; Frances Kellor, First Vice President; Joseph S. Murphy, Educational Director.

Spain: Barcelona, Bilbao, Madrid; *Sweden:* Stockholm; *Switzerland:* Basel, Geneva, Weinfelden, Zurich; *Turkey:* Istanbul.

WORLD TRADE ARBITRATION INFORMATION

Perhaps the most significant achievement of the Council is the amount of information on laws, rules and regulations on commercial arbitration that has been received from all corners of the world from its Correspondents. The number of trade and commercial organizations that maintain facilities in different countries is most encouraging. While many of these laws and regulations are designed for domestic use, they are frequently applicable to international commercial controversies in important foreign trade centers.

These communications put the Council in the position of being an efficient information bureau, for it now possesses not only the most up-to-date information but is in a position to supplement it through further recourse to its Correspondents. The information already covers more than 55 trade and commercial organizations in 20 countries.

It also includes information, hitherto not readily available to Americans, on the rules and regulations governing 25 member organizations of the British Federation of Commodity Associations. As these regulations govern the settlement of disputes arising out of commodity contracts to which Americans are sometimes parties, their accessibility in the United States is of high importance to American traders. The British Federation was formed in 1942 with the object of considering the postwar problems of the traders concerned and offers a pattern for a similar Federation of American Commodity Associations in the United States.

ANNOUNCEMENT OF CONCLUDED TRADE ARRANGEMENTS

The pamphlet, on Foreign Trade Arbitration Facilities and Services, as initiated by the American Arbitration Association and as advanced by the Council, has been republished in more complete form and is being widely distributed by the Council. The publication covers arrangements for international arbitrations in the United States, the Latin-American Republics and Canada; and as between the American Arbitration Association and the following organizations for international arbitrations outside of the Western Hemisphere: International Chamber of Commerce; London Court of Arbitration, Manchester Chamber of Commerce, China Trade Arbitration Association and the

Chamber of Commerce of the Philippines. Joint clauses are in effect for the reference to arbitration of disputes that arise within these areas of foreign trade.

INDIAN-AMERICAN TRADE ARBITRATION

The Council is also facilitating the negotiation of an agreement for the arbitration of Indian-American trade disputes. This negotiation is proceeding between the American Arbitration Association and the Federation of Indian Chambers of Commerce and Industry under which a joint Trade Arbitration Commission may be established for the settlement of Indian-American disputes. The acceptance of Mr. K. A. D. Naoroji, President of Tata, Inc., as a member of the Council is noted with pleasure.

TURKISH-AMERICAN TRADE ARBITRATION

Negotiations are also proceeding with the Istanbul Chamber of Commerce for the settlement of Turkish-American trade disputes. This action is being taken with the cooperation of the U. S. Department of State through which the Turkish Ministry of Commerce favorably recommended that such an arrangement be made.

NATIONAL ARBITRATION ASSOCIATIONS

As American foreign traders quite customarily use continuous or uniform contracts for their trade in different countries, they have suggested that having one organization, such as a Federation of Chambers of Commerce or a combination of all arbitration facilities and services in one clearing house in each country, would greatly facilitate the settlement of international trade disputes to which Americans are parties. The Council leaves to each country the determination of the kind of central organization it will designate as the one to assemble and clear disputes under contracts to which American traders are parties. Where there is no such central agency, the Council is suggesting the organization of National Arbitration Associations. These Associations have the advantage of not being concerned with any economic policy or the promotion of trade, but are interested solely in the development of the practice of arbitration.

As a result of an address prepared by Sylvan Gotshal, and presented at the International Meeting of Parliamentary Representatives and Experts for the Development of International Trade, in Genoa in September, 1948, the organization of an Italian Arbitration Association is now under consideration by

a special committee. Discussions of the organization of national associations have also been held in Western Germany and in Egypt.

Arbitration Associations not only deal with foreign trade but serve to develop and coordinate arbitration facilities within a country for its domestic trade. For example, the China National Federation of the Chambers of Commerce, China National Textile Manufacturers' Association, National Association of Shipowners, National Federation of Bankers' Association, National Federation of Native Bankers' Guild, National Federation of the Chinese Industries, National Federation of Builders' Guild, Foreign Trade Association of China, National Chartered Public Accountants' Association, Federation of Insurance Association of China, Shanghai Lawyers' Association cooperated in organizing the China Trade Arbitration Association.

ANNOUNCEMENT OF THE GOVERNMENT OF ECUADOR

The advancement made in international commercial arbitration, through an announcement of the Government of Ecuador, is of importance, because the Council is planning to advance knowledge of this proposal to other Governments. This plan has been consummated through the joint efforts of the Consul General of Ecuador, C. Duran-Ballen, and George N. Butler, Executive Secretary of the Inter-American Commercial Arbitration Commission and a member of the Council's staff.

The announcement states that the Government of Ecuador, through the Imports, Exports and Exchange Control Department of the Central Bank of Ecuador, has adopted the arbitration clause of the Inter-American Commercial Arbitration Commission for all of its international transactions; and that in future all import permits and export licenses issued by the Central Bank of Ecuador will have printed upon them the full text of the clause.

Arbitrations will generally take place where the commodity may be located at the time of the controversy, where jurisdiction may be obtained, or where suitable facilities in particular instances can be commanded.

It should be noted that this action does not affect the right of the parties in controversy to submit it to the jurisdiction of the courts when they are agreed that important principles of law are involved that may warrant a judicial determination.

EXPANSION OF BRITISH-AMERICAN TRADE ARBITRATION

Following the completion of arrangements between the American Arbitration Association and the London Court of Arbitration, the Federation of Chambers of Commerce of the British Empire, meeting in Johannesburg in September of 1948, adopted a resolution recommending that British Chambers of Commerce having arbitration facilities should enter into arrangements similar to that of the American Arbitration Association with the London Court of Arbitration. That arrangement provides for the use of a joint arbitration clause, whereunder arbitrations will be administered under the Rules of the Court of Arbitration, if held in London; and will be administered under the Rules of the American Arbitration Association, if held in the United States.

As there are a number of such Chambers located throughout the British Commonwealth, the consummation of agreements on this pattern and in accordance with this resolution will be a considerable undertaking in the New Year.

SIGNIFICANCE OF INTERNATIONAL TRADE ARBITRATION AGREEMENTS

The significance of these arrangements does not lie in the number of disputes that may be submitted to arbitration but in the number they may help to avoid. It does not lie in the mechanics established but in the evidence of goodwill that makes settlements possible. It does not lie in the actual use of machinery but in its availability and in the opportunities afforded for friendly intercourse in trade relations, resulting therefore, in the steady reduction of controversy.

RELATIONS WITH U. S. GOVERNMENT AGENCIES

In the making of these arrangements and in the advancement of its work generally, the Council acknowledges with high appreciation excellent cooperation from the Departments of State and Commerce of the U. S. Government. This has included wise counsel in policymaking and in the furtherance of negotiations. In the distribution of information to the foreign offices and to other representatives of the U. S. Government, the Departments of State and Commerce have been especially helpful.

PREVIEW FOR 1949

The work of the Council for 1949 is already well under way toward:

1) The further development of arbitration arrangements with commercial organizations in other countries.

2) The federation of organizations having arbitration facilities and services.

3) The expansion of the arrangement with The London Court of Arbitration to Chambers of Commerce of the British Empire having arbitration facilities.

4) The issuing of an International Arbitration Bulletin and other publications for a better exchange of information.

5) The advancement of government interest in arbitration through close cooperation with the Department of State and Commerce.

6) The initiation of further studies to keep American business men informed upon all aspects of controversy and dispute in which they have an interest.

THE FINAL GOAL

The final goal of the Council is: 1) To enable Americans engaged in foreign trade to clear all commercial disputes through one central agency or organization, through the coordination of existing local agencies to act through a central clearing house, or through a combination of such agencies. 2) To bring about the use of standard arbitration clauses that will be universally applicable under multiple or continuing forms of commercial contracts. 3) To develop educational facilities in each country, so arbitrations will be competently administered and the awards observed in good faith. 4) To better business relations through the gradual reduction of the economic waste that results from commercial misunderstandings and disputes. 5) To establish arbitration as an economic and social international institution contributing to the advancement of world peace and security.

World Law for Individuals

International Commercial Arbitration—The Next Step

James Oliver Murdock*

Civilization's rise has and will depend on dreamers as well as realists. Great ideas with ideals are the stern stuff that have and will shape a decent reality for all mankind.

The idea of world law *today* for all individuals is shooting at the stars. But without a long-range view to fix a worth while ultimate objective, the direction and pace of the next practical step cannot be intelligently planned. A good objective, clearly defined, solves half the problem. It determines the high strategy of attack. The tactical means to achieve the desired result often will depend on the ingenuity and opportunities of the moment, so long as only good means are persistently used to achieve the goal.

The recent Report to the American Bar Association the pertinent parts of which are reprinted on p. 206 of the Arbitration Journal, admirably illustrates this thesis. Its accompanying Minority Report (p. 207) recommends the development *now* of permanent international tribunals with direct jurisdiction over all individuals. Presumably these international tribunals would have jurisdiction over all international cases involving individuals and private international law (conflict of laws) questions. A sufficient number of "permanent, independent and competent courts" would have to be organized and staffed all over the world in order to make justice readily accessible and provide prompt remedies. A fully organized international executive to provide for enforcement would also be needed.

With the United Nations deadlocked by the inflated veto power of the "great powers" and the major peace treaties still to be negotiated, the timing is bad for the realization *now* of an organically mature international judicial system for individuals.

* The author of this article has represented the United States Government as counsel before International Tribunals, was a Legal Adviser on Western European Affairs in the Department of State for several years, is the Professor of Foreign and of International Law at the George Washington University Law School and the Chairman of the Committee on the Pacific Settlement of International Disputes, Section of International and Comparative Law, American Bar Association.

The Minority Report cites the Nuremberg and Tokyo War Crimes International Tribunals to demonstrate that the rule of law in the international community has been extended directly to individuals. While it is true that there are no legal rights without adequate judicial remedies, reference to the Nuremberg and Tokyo Tribunals is unfortunate. Even if these war tribunals, frantically improvised in the heat of the passions of social disorders, be sound guides for the age of sweet reason man is to achieve, their utilization again must await the termination of World War III. The guiding purpose, however, of world law in the making is not to provide for the formal burial of civilization, but rather for an extension of its life and then a renaissance of human freedom everywhere.

The Minority Report wisely observes that it is not new rules of international law that are solely needed, but rather "judicial machinery of interpretation and enforcement." No one familiar with the formative growth of the law would question this thesis, except to observe that courts do not enforce their judgments. Executive police power has this function, when the imminence of its use and moral suasion fail.

Notwithstanding the impatience of the Minority Report to attain the millennium in one leap, its author has provided the stimulus for and the ultimate objective of the Majority Report. The idea of extending the rule of law in the international community directly to individuals by providing effective remedies is the definitive major objective.

What are the intermediate stages or steps to achieve this good end?

International justice for the individual and nations, is still a starlike aspiration of the common man and the statesman striving to live in a decent world community. Dreams of its full realization are but blueprints of the ultimate objective. These are useful, to fix the course for a long voyage. But abiding world community institutions of justice can no more be constructed overnight than were the solid foundations and superstructures of the Roman-Civil Law and of the Common Law. To imagine the instantaneous adoption of mature processes of peaceful settlement, developed over the centuries in politically competent nations, to the anarchic world scene is but pursuing a mirage.

Our primitive, heterogeneous world society requires rudimentary and flexible techniques essential to cope with the rough work of clearing the rubble of social explosion for the new

foundation of the temple of world justice. The conception of creative ideas is followed by a vigorous formative period and birth of the new ideal in the hearts of decisive majorities. A period of healthy growth ensues, based on the solid experience of functional cooperation, to make the ideal a practical reality.

Finally come the blossoms and then the fruits—the culmination of organic structure. We cannot eat the fruits of justice till we plant the seeds of truth, nourish the embryo with the life blood of moral values and cultivate the progeny in the rugged schools of experience and reason, so that our ideal may bear good fruit, free from the parasites of ignorance and greed.

These are the underlying concepts that produced the Majority Report and the recommendation regarding the progressive development of International Commercial Arbitration. But the Minority Report, presenting the dissent, envisions the distant goal and it is good. The Majority Report supports the Resolutions, which were unanimously approved by the Section of International and Comparative Law, and adopted in September, 1948, by the House of Delegates, the legislative body of the American Bar Association. The Resolutions not only envisage the distant goal, but indicate the next step on the highway to freedom under law for men who work to produce the material necessities for the world community in the making. The Resolutions and the supporting Report recommend the intensive development of international commercial arbitration as the evolutionary step towards world law for individuals.

While the solution is not complete, it provides a practicable next step. Commercial arbitration is increasingly available in many parts of the world. Its global growth depends primarily on private initiative, integrity and cooperation. It has not lacked governmental support in the enforcement of arbitral awards by national agencies of competent jurisdiction.

Impartial third party arbitral awards, based on complete understandings of the facts, will light the way to mature jural concepts and remedies that will help make world law for individuals a living reality.

American Bar Association

Section of International and Comparative Law

Full text of the parts of the 1948 Report of the Section's Committee on the Pacific Settlement of International Disputes that relate to International Commercial Arbitration. Approved by the Section and the House of Delegates at the 71st Annual Meeting of the American Bar Association in Seattle, Washington, September 6-11, 1948.

RESOLUTIONS

Resolved, That the American Bar Association, with a view to extending the rule of law in the international community directly to individuals, advocates the intensive development and widespread use of commercial arbitration for the direct settlement of disputes between individuals of diverse nationalities and between individuals and foreign states in matters involving international commerce, transport and communications.

Resolved further, That the American Bar Association recommends that the appropriate agencies of the United Nations, the Organization of American States, and the Government of the United States, with the cooperation of interested private organizations, take all practicable measures to stimulate the development of effective international commercial arbitration between individuals of diverse nationalities and individuals and foreign states, with a view to evolving on the basis of such experience, the establishment of permanent international commercial tribunals with direct jurisdiction over individuals.

REPORT REGARDING THE PROGRESSIVE DEVELOPMENT OF INTERNATIONAL COMMERCIAL ARBITRATION

The purpose of this recommendation is to stimulate the development of effective means for the impartial and prompt determination and enforcement according to law of disputes that arise in international commerce, transport and communications. International law at present makes no provision for private individuals doing business abroad to vindicate their rights in international courts. Only states may be parties in cases before the International Court of Justice or the Permanent Court of Arbitration. With the abolition of extraterritorial jurisdiction in the Near and Far East, consular and other extraterritorial courts are no longer available to adjudicate private international commercial disputes and no impartial alternative method has been devised to safeguard international business transactions.

It seems premature, however, to recommend at this time the establishment by the United Nations or a world regional organization of a system of permanent international commercial tribunals with jurisdiction over individuals. The course recommended, accordingly, is that the United Nations, the Organization of American States, and the United States Government

recognize the need for such tribunals by employing in the meantime every available means to promote the development of effective international commercial arbitration and procedures for the enforcement of arbitral awards. An international authority to coordinate, supervise and extend the working of international commercial arbitration is essential.

Substantial progress has already been achieved through the initiative of unofficial organizations, as is shown by the rapid expansion in the use of arbitration clauses in international trade contracts.* With the experience gained over the next few years, it should be possible for the United Nations and the Organization of American States to evolve permanent international commercial tribunals with direct jurisdictions over individual litigants. The achievement of this objective would provide the international business community with impartial tribunals comparable to those provided for inter-state business in the United States by the Federal Court System. It would supersede the present cumbersome procedure whereby a business enterprise engaged in foreign commerce must first sue in a foreign court and, if denied justice, endeavor to persuade its government to present an international diplomatic claim in its behalf. The injustice and inordinate delays of this cumbersome procedure are too well known to require elaboration. It is essential to provide international business with means for the prompt and impartial third-party determination of disputes that may arise.

This recommendation is limited to making provision for the determination of disputes of an international commercial or business character. It designedly excludes other matters, such as so-called human rights questions, the American Bar Association having gone on record as opposed to the creation of an International Court of Human Rights.

It is confidently believed that the progressive development of International Law would secure widespread popular support and be greatly stimulated by the early official recognition of the need for evolving methods for the direct protection of the security of international business transactions. The newly created International Law Commission of the United Nations could render no greater service to the interdependent world economic community than to devote its best efforts to the solution of the problem herein outlined.

Respectfully submitted,

JAMES OLIVER MURDOCK, *Chairman*
STANLEY P. SMITH, *Vice-Chairman*
GEORGE E. MONK, *Secretary*
EDWARD W. ALLEN
KENNETH S. CARLSTON
WILLARD B. COWLES
† ROBERT B. ELY, III

August 10, 1948

MINORITY REPORT OF MR. ELY

I dissent from the First Recommendation on two main grounds.

I do not believe that the rule (or rules) of law in the international community need to be "extended" in order to apply directly to individuals. As

* For current international developments in this field, see 1946, 1947 and 1948 issues of The Arbitration Journal, published by the American Arbitration Association, 9 Rockefeller Plaza, New York 20, N. Y.

† Dissented. See Minority Report of Mr. Ely.

the reading of the reported decisions of national courts, and of countless *ad hoc* multinational tribunals (such as those recently sitting at Nuremberg and Tokyo) will show, there is already in existence a considerable body of international law governing the rights and duties of individuals. The real solution to the problem of encouraging its progressive development (*Cf.* United Nations Charter, Article 13.1) lies not in the manufacture of new rules, but in securing for existing rules the universal knowledge and respect without which they will remain in the future, as they have been in the past "an evanescent mystery, to be invoked only when (they serve) to bolster a prior political opinion" (Judge Manley O. Hudson quoted in 30 A.B.A.J. 560).

The proper method of securing for international law this necessary public knowledge and respect is to provide it with the same judicial machinery of interpretation and enforcement which has earned the knowledge and respect enjoyed by other types of law: that is to say, permanent, independent and competent courts. To suggest that in place of such courts, intensive use should be made of the makeshift and strictly non-judicial processes of arbitration is merely to recommend the perpetuation of the past errors which caused international law to be generally regarded as "pious but impotent." (William E. Jackson in Foreign Affairs, July 1947).

The majority report does not indicate why "it seems premature . . . . to recommend at this time the establishment . . . . of permanent international . . . . tribunals with jurisdiction over individuals." Presumably the reason is that there is some vagueness and internal contradiction in the rules expounded by the various non-international tribunals which, *faute de mieux*, have functioned in the field in question. However, as the former Chief Justice Charles Evans Hughes said (16 A.B.A.J. 151) "If you were to wait for an international court until you get a satisfactory body of international law, the only time such a court could function would be in the millennium; and most people may doubt whether at such a time it would be necessary." No body of law is ever in a wholly satisfactory state. If it were, there would be no need for a legislature. However, no legislature, global or national, can function intelligently in deciding what new laws there should be, without a judiciary to declare what the past laws have meant.

I would therefore favor the elimination of the first Resolution from Recommendation No. 1 of the majority report, and the amendment of the second Resolution by the elimination of the words shown in square brackets, as follows:

"*Resolved further,* That the American Bar Association recommends that the appropriate agencies of the United Nations, the Organization of American States, and the Government of the United States, with the cooperation of interested private organizations, take all practical measures to stimulate the development [of effective international commercial arbitration between individuals of diverse nationalities and individuals and foreign states; with a view to evolving, on the basis of such experience, the establishment] of permanent international [commercial] tribunals with direct jurisdiction over individuals."

International Tribunals for Private Matters

Ernst Rabel *

The question whether international courts for private matters ought to be established has been gratifyingly included in the program of the International Bar Association at its meeting of 1948. In my opinion, the answer to this question should be in the affirmative.

For the sake of simplicity, the following remarks will be restricted to causes of action most typically of a private law character, in contrast to the expanding sphere of public international law. These concern ordinary commercial agreements between domiciliaries of different countries, or the rights of holders of bonds against a foreign debtor, if they are construed as belonging to private law, irrespective of the borrower's quality as a state or an international body (which I regard as the correct construction). In this sphere, at least, it was prevailingly recognized in important debates before the last war that private persons need international judicial relief. To the arguments for this, it may be permitted here to add a reference to the general situation characterizing legal development at this time, a stage marked by the slow collapse of barriers between countries and a new awareness of historical and cultural ties.

The bulk of our laws have grown within secluded geographical borders, promoted by the vicissitudes, nourished by the ideas, destined for the safeguard, of one country, one state, or nation. But we are living in a larger community, and the effect on legal relations cannot be restricted to public international law. The most convincing proof is the striking fact that international trade has established an awe-inspiring network of standard forms and an ever-growing system of arbitration with the effect of eliminating the entire array of the state courts and of the national laws, whether concerning conflicts, commercial, jurisdictional, or procedural matters. Although this phenomenon has not yet aroused all lawyers to full consciousness of what is miss-

* Formerly Judge of the Permanent Court of International Justice; author of "The Conflict of Laws. A Comparative Study" 2 vols. Chicago 1945 and 1947.

ing in our equipment, scholars have not been inactive in inquiry and proposals. With the great help of comparative research, legal science is on its way to enlarge its content to a scope coextensive with international life.

Thus, we have reached the present momentous epoch with a very great number of more or less satisfactory separate systems of law, an international business community vigorously emancipated from all these systems, a small segment of international treaties involving private matters, more unratified drafts of treaties and uniform legislation, and a hopefully striving but inchoate science of comparative law.

But scholarship and legislation in isolation have never been able to secure the sound progress of the law. In the history of Rome and England and the working of the Continental codes, learned studies and judicial practice have been inseparable. Formulation of contracts, uniform laws and treaties must be products of experience rather than speculation.

What judicial machinery do we possess for establishing a private law suitable to the international activity of private persons?

The national courts have been criticized in comparison with arbitration. In my opinion the truth is this. The courts of the civilized world are the just pride of their respective nations. Fear of outright partiality against foreign parties is no longer warranted, excepting in some backward areas. Judges may sometimes confuse justice with domestic concepts or even domestic interests, but this is just a flaw inevitable in human institutions. What the courts, however, have failed, in fact, to achieve, is the establishment of any reliable set of conflicts rules, and they are by nature slow to follow the changing patterns of business transactions. In the international field, we cannot expect of average judges throughout the world such close familiarity with the habits of traders, carriers, banks, and insurance companies, as the famous courts in the great centers possess.

Commercial arbitration would not have achieved its triumphal conquests, if its claim to provide speedy, expert, and fair justice were not largely justified. Some serious criticism by informed lawyers may be obviated by certain reforms. We are, however, interested in the relation between arbitration and law. The English system reserving the right of a party to ask for a "special case" and the regular review of awards in court has been hailed by many British jurists. Yet, a growing volume of opinion runs to the contrary. Not only in American arbitration but prevail-

ingly in the world, an award cannot be challenged because of any legal mistake or failure to apply a law, or for the failure to give any grounds for the decision. Hence, the departure from judicial process is formally complete, although substantially the proceedings may be excellent, especially when some of the eminent lawyers connected with arbitration preside. Personally, I believe that at least in the great courts of arbitration, the facts are accurately stated (which ends the majority of causes), the usual contract stipulations are aptly construed, and legal arguments intelligently discussed. The trouble is that an opaque veil of secrecy clouds the entire operation. We may take it that business regards the exclusion of publicity as an additional advantage afforded by arbitration. But must it really be so consistently exercised? At any rate, these tribunals, discarding the last chains binding them to compulsory application of the national laws, working in silence, free from our criticism, refuse to impart to us the so much desired lessons on the development of commercial law and fail completely to enrich our science and to improve our statute books. If they foster progress of law, we do not know it.

The International Court of Justice should not be burdened with the cumbersome daily task of private litigation. The leading authorities of public international law in the court are especially selected and needed for the development, so much delayed, of a richer law of nations. The Hague Court was well aware of its great task and of its natural limitations, when it refrained from inquiring into private substantive or conflicts law except in state controversies where this was unavoidable. It has been the intention and merit of the modern scholars and the court, to divorce methods and rules of international law from its old civilian background. Sometimes this was done with exaggeration. No inverse confusion should be sought. In what sense the general private law of the future may be termed international, I should like to regard as a *cura posterior*. However, it has to remain private law.

Hence, our time urgently needs unification of certain parts of business law and for the rest of private international relations a practical *modus vivendi* among the national systems, including reasonable conflicts rules. The large research required for these purposes is in the making. The necessary judicial support is missing. International tribunals ought to be established essentially different from the Mixed Arbitral Tribunals of the Versailles Treaty. Could not the same deserving organizations

that provide for arbitration assume the sponsorship of an appropriate movement and aid the new enterprise with their experience?

The main doubt in competent discussions of international tribunals has been concerned with the law to be applied, and various proposals have been presented. Difficulties exist, but they are by far not so terrific as lawyers unfamiliar with comparative research usually imagine. "General principles of conflicts law," it is true, do not exist literally. But in the field of contracts, a court is able to determine what law to apply, if it (1) frankly recognizes party stipulations for the applicable law, and (2) subsidiarily ascertains the territorial center of the typical relationship. For instance, F. O. B. and C. I. F. sales are quite conveniently subjected to the law of the place of the shipment (if in the seller's or the buyer's country), a brokerage to the law of the broker's place of business, etc.

"General principles," however, do exist in the most effective and comprehensive manner in private law. Legal history and modern systems of law manifest an abundant wealth of common ideas. Common law and civil law have never been so antagonistic as traditional prejudice presumes and more recently have appreciated each other in many respects. Details are different, of course, yet much remaining divergency has simply been erased by the standard forms.

The World Court in its own field has shown us how to reconcile considerable differences in background and training of judges and to crystallize substantial rules of international value. A court of private law has an infinitely easier task. Most cases do not present such divergency of the national laws as, for instance, the Mixed Claims Commission, United States and Germany, once overcame. Facing the various apparently heterogeneous death statutes, the Commission nevertheless ascertained the modern development to the effect that exemplary damages were excluded, but life insurance benefits were not deducted from compensation for tort.

Critical comparative research has done and can do much more to create a sure basis for justice on the international level. With its help, experienced courts speaking from this platform will not only provide security in international transactions but also exercise a hitherto unknown beneficial influence on state courts and arbitrations.

Arbitration at Two International Law Conferences

Peter Sanders*

Last summer two law conferences, where arbitration played a part, were held in Europe, one in The Hague, the other in Brussels. In August the International Bar Association met in the Palace of Peace in The Hague. Many distinguished lawyers from all parts of the world were present at this second international conference of the legal profession. 313 representatives of more than 45 states came from all parts of the world, from Ceylon as well as Brazil, Liberia and Iran. The main subjects of this conference were "Restoration of the Law and Property Rights after World War II" and "An International Code of Ethics for Lawyers." It was in the Symposia that arbitration played a part. In one Symposium the well-known Dutch Professor Cleveringa of the Leyden University proposed the establishment of an International Maritime and Aeronautic Law Court. Prof. Cleveringa who knows only too well the many failures in the past considered it advisable not to ask for an international private law court on the whole field of private international law but to limit its competence at the beginning to a province of law where there is already a certain natural impulse towards legal unity: maritime and aeronautic cases. For the same reason the court should not have, at least in the beginning, compulsory jurisdiction. The court should only be permitted to go into an issue if its competence by reason of an agreement of the litigating parties is proven. Then Professor Cleveringa continues his paper as follows:

> "A so constructed law court will be a kind of arbitrator. With the idea that such an agreement for existing and future disputes is binding upon the contracting parties and that a subsequent award is enforceable in the national states, the world has already grown familiar since the Geneva Conventions of 1923 and 1927. In such an arbitration form an international maritime court will more readily be accepted because then the statesmen know that they are not plunging into dangerous adventures. Only its official and permanent character will be new."

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This idea was accepted by those present at the Symposium and a resolution was passed and accepted later on by the House of Deputies of the Association giving full adherence to the proposition of an international maritime and aeronautic law court and asking the Bureau of the Association to contact on the subject the Comité Maritime International at Antwerp, which committee of experts will soon deal with this matter.

More papers which also dealt with arbitration were presented to the conference but did not come into discussion. Edgar Turlington, of Washington, D. C., proposed a draft of a general agreement for the pacific settlement of international disputes between states; Ch. Carabiber from Paris described "Juridictions internationals de droit privé et le fédéralisme judiciaire"; and Ernst Rabel from University of Michigan on International Tribunals for private matters.*

The conference gathered in the Palace of Peace, where both the International Court of Justice and the Permanent Court of Arbitration are settled. So one need not be astonished that a resolution was accepted drawing attention to the fact that in 1949 will be the 50th anniversary of the first Hague Convention of July 29, 1899, on the Pacific Settlement of International Disputes, as a result of which convention the Permanent Court of Arbitration was set up. In its 50 years of existence only 23 arbitrations have been held, all of them between states but most of them dealing with private claims that were espoused by the State on behalf of its national. It seemed worth while to study how further and better use could be made of the machinery of the Permanent Court of Arbitration. The resolution therefore suggests to celebrate the 50th anniversary with a conference of the members of the Permanent Court of Arbitration or at least one member of each national group, to study the future of this organization.

In Brussels the International Law Association held its 43d Conference in commemoration of the 65th anniversary of the foundation of the Association in Brussels in 1873. Here arbitration played an even more important role and formed one of the main points of the agenda. The French branch, headed by Paul Govare from Paris, who has been active since 1934 in promoting the idea that the I. L. A. should have arbitration rules of its own, found their perseverance rewarded at this conference. What the Budapest conference of 1934 and the Amsterdam conference of 1938 rejected, the Brussels conference of

* This latter paper is published here on p. 209. (Ed.)

1948 accepted—at least in principle: the I. L. A. shall have its own set of arbitration rules. These rules will be laid down at the next Conference.

Many of the speakers at the conference were strongly opposed to this resolution. They pointed out that the international commercial world is not in need of new arbitration rules. The rules of the American Arbitration Association, The London Court of Arbitration and the International Chamber of Commerce are already at their disposal. All these rules—these speakers argued—have been improved in a long experience and are far better than the French draft.

In my opinion these speakers were right. The French proposal, e.g., does not provide for an administrator, a central and neutral body that helps the parties in the setting up of the tribunal and the conducting of the arbitration. Without such an administrator no arbitration and certainly no international arbitration can be recommended. Not later than 1946 Sir Lynden Macassey pointed out very clearly to the Conference of the I. L. A. at Cambridge, that an administrator is essential for international commercial arbitration.

As a consequence of this lack of administration the nomination of arbitrators is very unsatisfactorily provided for in the proposed rules. These rules leave the appointment of the arbitrators to the parties: each party chooses its own arbitrator, and these two arbitrators choose the third. In practice only this third arbitrator will be a real arbitrator. The two arbitrators nominated by the parties will only act as their advocates. So we find here the so-called party-arbitration proposed as a fixed rule. This is a great deterioration in comparison with the existing rules of other organisations.

This third arbitrator, who is the only real arbitrator, will however, as far as I can see, never come into existence for he has to be appointed—according to the rules—by the two arbitrators within a fortnight. This will not practically be possible. Even in a national arbitration this time limit would be too short. How will it be done when the two arbitrators live in different countries? Take, e.g., an arbitration between a party in Brazil and one in France. These parties will, if ever, each nominate a compatriot as arbitrator. But never will these two arbitrators agree on the third within such a short term.

The rules however say: when the two arbitrators don't agree within a fortnight on the third arbitrator, who as a matter of fact is to decide the case alone, they have to agree within an-

other fortnight upon the person that will do the nomination. For the same reasons this will not happen either. Never mind—the rules say—then the President of the I. L. A. has to nominate the third arbitrator. I really doubt if these Presidents or whatever other officer of the Association might be chosen will really be pleased with this task for which they are by no means equipped. Enough to demonstrate that the nomination of arbitrators has not been satisfactorily provided for in the draft rules.

I would have to go too much in detail to develop further, that also during the arbitration and all the incidents that might arise in that course, the proposed rules guarantee in no way a sound and speedy solution. So, all together, these rules will be of no help for the parties—and that is what they ought to be. If the next conference of the I. L. A. has really to adopt a new set of arbitration rules, these rules will, I hope, be quite different from those that have been proposed at the last Conference. I fear they will not, because the I. L. A. cannot provide the machinery necessary for international commercial arbitration, and cannot supply the necessary funds either. So the only thing the I. L. A. can do is something in the way of the French draft or nothing which I personally would prefer.

On the other hand, full appreciation can be given to the motion moved by the Secretary General Mr. W. Harvey Moore, K. C., and accepted by the plenary session with a unanimous vote. This motion reads as follows:

> "That this Forty-third Conference of the International Law Association, assembled in Brussels to celebrate the Seventy-fifth Anniversary of its Foundation in that City in 1873, expresses its deep regret that the nations of the world have progressed so slowly towards establishing international arbitration as a solution for the disputes that still destroy international understanding and goodwill; and urges that international arbitral processes by independent men be used whenever it is necessary to establish facts dispassionately, or arrive at just solutions, in matters of controversy between states, or nations, whether great or small. For these purposes it urges that use be made of the Permanent Court of Arbitration; or the International Court of Justice deciding ex aequo et bono; or any other forum, based upon reason and consisting of men pledged to impartiality, that may be created to take the place of decision by war, which is decision by cruelty."

With this motion the International Law Association is in line of the educational work which has been done by other

organisations in promoting arbitration as a means of peaceful settlement of disputes. We can only be glad that an old and famous association as the I. L. A. joins in the common effort and gives it the full support of its great authority.*

This short survey of conference-activities in Europe last summer shows how strongly arbitration is in the mind of everybody. Arbitration is on its way and—to modify a well-known saying about truth—nothing will stop it. Let us hope so, for the benefit of mankind.

* *Ed. Note:* The Brussels Conference of the International Law Association adopted the following resolution:

WHEREAS, It is desirable to encourage the use of arbitration in international trade and industry and whereas the law in various countries does not recognize the validity of an agreement to arbitrate future disputes, or requires burdensome formalities, or fails to make effective provisions for the enforcement of awards;

Resolved, That the International Law Association urges its branches and members to work for the reform of arbitration law where necessary and in co-operation with other organizations.

FEDERATION OF CHAMBERS OF COMMERCE OF THE BRITISH EMPIRE

Statement taken at the Sixteenth Triennial Congress of the Federation at Johannesburg, South Africa, September 25, 1948:

ARBITRATION AGREEMENT

The Eleventh Congress, meeting in South Africa in 1927, recommended model rules of arbitration for adoption by Chambers of Commerce throughout the Empire. These rules were subsequently adopted by a number of Chambers including the London Chamber. During 1947 the London Court of Arbitration entered into an Agreement with the American Arbitration Association, 9 Rockefeller Plaza, New York 20, N. Y., to facilitate the settlements of disputes between the nationals of the two countries. The clause which has been recommended for inclusion in contracts between nationals of the two countries is:

> "Any controversy or claim arising out of or relating to this contract or breach thereof shall be settled by arbitration. If the arbitration is held in England, it shall be conducted under the Rules of the London Court of Arbitration and the construction, validity and performance of the contract shall be governed by the law of England. If the arbitration is held in the United States, it shall be conducted under the Rules of the American Arbitration Association. Judgment upon the award rendered may be entered in any court having jurisdiction thereof. In the event that the parties have not designated the locale of the arbitration and are unable to agree thereon, either party may apply to the International Law Association in London to decide the locale and its decision shall be accepted by the parties thereto."

It is recommended that other Commonwealth Chambers which have Arbitration Tribunals should enter into negotiations with the American Arbitration Association with a view to including similar clauses in contracts between American traders and their own nationals. It is felt that by so doing, a possible source of friction and misunderstanding would be removed.

Problems in Handling Foreign Trade Disputes

Morton Zuckerman *

The irritating existence of a great many disputes between American and foreign business firms has quite naturally caused great concern to reputable merchants everywhere and has been a subject of major interest to various Chambers of Commerce and governmental agencies concerned with international trade.

For the greater part, these disputes arise from claims that merchandise received by the importer materially differs in quality or even in kind from the merchandise he had ordered, whether such order was placed by sample or by description. For the lesser part, the disputes are concerned with honestly differing concepts of trade terms, definitions of particular items or of the actual requirements of the contract between exporter and importer.

Where the foreign importer is required to purchase on the basis of a letter of credit, he may seek to safeguard himself by requiring an independent inspection of the goods prior to their shipment. In the usual case, however, the importer for many reasons relies upon the integrity of the exporter. This reliance is sometimes sadly abused. The importer, having in effect made advance payment of U. S. dollars has at present a most difficult task in obtaining satisfaction from the exporter whether by way of restitution or by recovery of monetary damages or performance of contract.

No adequate machinery has been found to exist in the Federal or State Governments to effect results for the foreign claimant. In his effort to obtain redress, he is relegated to the channels usually available to merchants, with the important distinction that he is under several practical and disabling handicaps. These include differences of language, trade customs and contractual concepts. In addition the element of distance usually precludes confrontation of the importer and causes long delay while effort is made to expound and settle the claim by correspondence.

When his claim is frequently ignored by the exporter, even when presented through legal counsel, the determined foreign

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importer at present must resort to litigation. The non-resident alien is afforded the same full measure of remedy and judicial relief in our Courts as is afforded to citizens. Thus, the foreign importer may seek monetary damages, restitution, specific performance of a contract, or such other relief as our Courts may offer. In a law suit, however, the importer is at a burdensome disadvantage in connection with the presentation of his evidence. Where the importer is unable to be present and personally to testify, our existing legal procedure requires that his evidence be presented by way of deposition, testimony by commission, and legalistic authentication of documents and statements of witnesses. This is done by a cumbersome process involving the Courts of both counties. Moreover, the procrastination inherent in a law suit is too well known to require discussion. In short, the technical processes and delays of litigation do not provide a satisfactory method of resolving international trade disputes.

Experience has demonstrated that in private international trade, arbitration is the most useful and generally satisfactory method of settling disputes. The resort to arbitration however, requires the agreement of the parties, either in advance or at the time of the dispute. Generally, the exporter refuses to agree to arbitrate an existing dispute preferring the practical advantage given to him by litigation. The very serious problem therefore exists of assuring that the parties submit to arbitration. This may be done, of course, by adoption of an arbitration clause in their contract. Considerable sentiment exists in foreign governmental trade circles for the adoption of governmental measures requiring compulsory arbitration of private international trade disputes, and this view is supported by several foreign governments. In at least one South American country (Ecuador) an arbitration clause is required by the government on applications by the importer for an import license and dollar exchange. So long as the requirement of import licensing exists this may prove to be effective on the importers side of the situation. In this situation, however, it is difficult to fasten the compulsory nature of the arbitration clause upon the exporter. The suggestion has been made that the exporter be required to sign the arbitration clause in a pro forma invoice to be used by the importer in his license application. Moreover, the foreign consulates in the United States may refrain from issuing Consular invoices unless the United States exporter adopts the arbitration clause. In any event some satisfactory means of trade

discipline may be adopted by the foreign government desiring to make arbitration compulsory.

Once arbitration has been agreed upon or is made compulsory several interesting and vexing problems arise. The goal of arbitration, of course, is the speedy, inexpensive and effective resolution of a dispute. In the arbitration of a private international trade dispute complex factors are present which are more difficult of solution than in the domestic situations. These may for convenience be referred to in the following categories:

1. The place of arbitration (i.e., country of origin or country of destination of the goods);
2. The criteria for the selection of the arbitrators;
3. The functions of the arbitrators;
4. The conduct of the arbitration proceeding;
5. The use of authoritative goods surveys or panels of fact-finders with reference to the merchandise at its destination;
6. The conclusiveness of survey reports and the introduction of evidence generally;
7. The enforcement of the arbitration award.

For present purposes, it is sufficient to point out the problems entailed without making an exhaustive analysis of possible solutions. Here experience has demonstrated that where the concept of arbitration differs in the two (and sometimes more) countries whose merchants are involved in a dispute, a common-ground based on compromise must be reached.

Recommendation is earnestly made that a joint commission be created, composed of nationals of the U. S. A. and any other particular country having a sufficient volume of trade with the U. S. A.; to study the subject of their trade disputes, to determine the advisability of evolving an arbitration system, and defining the governing rules and assuring compliance with the determination and award of the arbitrators.

Arbitration Extends Far Afield

K. A. D. Naoroji*

In these times of international stress, it is significant to see business men initiating activity on their own behalf in the interest of settling controversies that inevitably arise in the course of international trade.

As a representative of the Tata group of enterprises, whose interests extend from the sub-continent of India across Europe and into the United States, I am particularly aware and appreciative of the activity of the group of business men who comprise the International Business Relations Council of the American Arbitration Association. As a citizen of India and the first overseas business man to join the council, my position lends some perspective to the accomplishments of this group who have voluntarily banded together in the interest of promoting the idea of international trade arbitration, with the long-range view of advancing arbitration in general, as a part of the world order for the maintenance of peace and security in all international relations.

BROADLY BASED MEMBERSHIP

The membership of the International Business Relations Council reads like a "Who's Who" of leaders in American industry engaged in international trade. It enjoys the membership and counsel of executive heads of such organizations as the International Business Machines Corp., the McGraw-Hill International Corp., the General Electric Co., the Firestone International Co., and a host of others.

The sponsoring organization, the American Arbitration Association, in the last quarter of a century has made all but phenomenal progress toward the elimination of controversy on the commercial and labor fronts in the United States. So successful were those activities that the eventual organization of arbitration procedures within the Western Hemisphere was a logical expansion step. By the end of 1934, through the work of the American Arbitration Association and with the co-operation of governments and business men throughout the Western Hemisphere,

* President, Tata, Inc., New York City.

it became possible to arbitrate trade differences between all the countries from Canada to Cape Horn.

HEMISPHERE PROVING GROUND

The Western Hemisphere was the proving ground. Here business men saw the time—and money saving advantages afforded by arbitration in international trade. More importantly, they saw that friendship and business relations need not be broken over ofttimes trifling matters arising in the course of international commerce and that, through the use of arbitration clauses and the facilities which organized arbitration afforded, costly, time-consuming litigation was avoided. In hundreds of cases, business men thousands of miles apart satisfactorily and fairly settled problems of dispute through arbitration which they would have been reluctant to see processed through other channels. The advantages were obvious.

Since arbitration worked with eminent success in the Western Hemisphere, why, they reasoned, would it not work on a broader international scale? It was from this success and this interest that the International Business Relations Council grew. It was formally organized on Nov. 19, 1947, with H. L. Derby, New York industrialist, as its chairman. The goal was clearly marked, but exactly as in international trade, so in the establishment of international arbitration processes, there were many barriers to be surmounted. The International Business Relations Council entertained no idea in the first place, nor desire in the second, of laying down rules or arbitration practices with a heavy hand. Indeed, it could not be done this way. The achievement of their goal would be a slow and painstaking process. As in the organization of inter-American arbitration practices, it would require the wholehearted support and co-operation of business men and governments around the world.

WORLD-WIDE REPORTS

One of the first steps was the council's appointment of nearly two hundred correspondents from every section of the world to report on arbitration facilities and potentialities existent in their particular areas. These correspondents were, like their counterparts on the United States scene, prominent business men devoting their time and effort to the cause of world arbitration—because they believed in it, because its successful application would result in an increased flow of trade in the immediate future, and

because they know that, on the far horizon, the lessening of international problems on any level is a significant contribution toward world peace.

The International Business Relations Council is carefully compiling, studying and analyzing the reports that are coming to them. From the information and plans received, they seek to find a common ground for the establishment of arbitration procedures. With the co-operation and help of business men abroad, they can then establish a world arbitration program. Arbitration agreements are already in force covering British-American, Chinese-American and Philippine-American trade. Significant advances have been made toward the establishment of arbitration agreements which will have a vital effect on trade between the United States and India.

INDIAN-U. S. COMMERCIAL TIES

All the conditions for the rapid and continuing development of such trade in the immediate future are already in existence. India has a stable government which derives strength from and commands the support of her people. Her financial position is sound. India has a favorable trade balance, no external debt but a large external credit, and a strong international budgetary position. She has, in addition, embarked on a vast program of rapid industrialization and agricultural development, which will require all the capital goods and technical assistance that the United States can supply for many years to come. In return, the United States will continue to need from India such products as jute and jute manufactures, shellac and lac, cashew nuts, tea, hides and skins, raw cotton and cotton waste, wool, leather, undressed furs, mica and manganese.

The over-all task for the establishment of a world arbitration program is large in extent and intricate in detail. Its effects on international trade are of the utmost importance. The American business men who are sponsoring this activity and their collaborators in other countries have embarked on a project of the highest order. Men of commerce are indeed making a positive contribution to international understanding through the friendly, peaceful solution of their own trade problems.

Some Questions under Swiss Arbitration Law

Dr. Sontag*

I. Zurich parties had agreed upon an arbitral tribunal for which each party designated an arbitrator; a third arbitrator to act as umpire was not provided for, contrary to art. 364 (1) of the Zurich Code of Civil Procedure. The arbitrators awarded the payment of a sum against the respondent. After rendition of the award, but before signing it, the arbitrator X resigned, whereupon the victorious party threatened him with claims for damages. Thereafter X signed the arbitral award. The respondent is of the opinion that the award is not valid. Petitioner, however, refers to article 368 (1), Zurich Code of Civil Procedure the last sentence of which reads as follows: "The refusal of a minority of the arbitral tribunal to sign the award does not impair its validity." In my opinion, reference to this sentence by the petitioner is not justified. The sentence speaks of the refusal to sign by a minority of which there is no question in case of two arbitrators. Nevertheless, I too am of the opinion that the award is valid. In signing the award, the arbitrator X revoked his resignation from the office of arbitrator by conclusive action. I would like to mention that the resignation of the office of arbitrator is not at all at the discretion of the arbitrators. On the contrary, by acceptance of the appointment as arbitrator, they are obligated to both parties to perform the duties of the office.

II. The parties had agreed that if an arbitral tribunal constituted by them would not render an award within a certain time, the Appellate Division in X should be requested to designate a new arbitral tribunal. One party later contested the legal validity of this provision. He is right in this point. There can be no doubt that parties may agree upon the designation of an arbitral tribunal by a third person, but this third person cannot be an authority (Behoerde). Authorities are empowered only to act on the request of a party within the framework of statutory provisions.

* Translated and reprinted with permission from the Swiss law review Schweizerische Juristen Zeitung, 1948, p. 274.

III. The parties had agreed that in case of disputes arising out of their sales contract, they would submit to an arbitral tribunal therein mentioned, and that the seller should have the option to action before the Municipal Court in X instead of before the arbitral tribunal. When controversies arose, the seller availed himself of the last mentioned right. The respondent, however, objected on the ground that besides resort to an arbitral tribunal agreed upon one party could not have the further right of action before the ordinary court. This additional provision was invalid as incompatible with the contract, it being contrary to the essence of the arbitration agreement. I am unable to share this latter opinion. There is no prohibition in the law (Zurich Code of Civil Procedure) that an arbitral and a cantonal tribunal cannot be declared competent at the same time. The autonomy of contract recognized in the Swiss Code of Obligations also has to be applied to the arbitration agreements. There is, therefore, no reason why it should not be legally possible for the parties to allow each other or to one party alone the right of a choice between an arbitral or a cantonal tribunal. It would only be inappropriate, if on the basis of the same contract, one party would initiate arbitration and the other, at the same time, proceedings before the State Court, e.g. when the buyer would ask for delivery of merchandise before the arbitral tribunal and the seller would maintain a court action for determination that he is not obliged to deliver. This interpretation would be against good faith.

U. S. Associates, International Chamber of Commerce, Inc., issued a Report of its Committee on International Commercial Arbitration entitled *"The American Businessman and International Commercial Arbitration."* The publication setting forth the advantages of arbitration over legal actions in commercial disputes explains the methods by which arbitration may be obtained. Said the Chairman of the Committee, Morris S. Rosenthal, President of Stein Hall & Co.: "Many American foreign traders are still not as familiar as they should be with the advantages and techniques of arbitration."

Arbitration in Finland

*Eljas Erkko**

All disputes relating to produce are settled by the Arbitration Board of the Central Chamber of Commerce. The Arbitration Board shall consist of respected Finnish members of the different fields related to agricultural, natural and collected produce, and when necessary, other experts.

The members of the Arbitration Board are chosen by the Central Chamber of Commerce for three years from candidates designated by the chambers of commerce, the Central Federation of Consumers' Co-operatives, the Federation of Retailers and the General Federation of Co-operatives. At the suggestion of said organizations the Arbitration Board assigns to the most important centres of consumption one or more neutral persons who may be called upon by the consignees to report on the quality, condition and quantity of merchandise.

The Arbitration Board may act in a dispute if the parties have signed a written agreement to comply with these terms of trade or otherwise have included in their contract a clause which evidently assumes that possible differences are to be submitted to the Arbitration Board of the Central Chamber of Commerce.

An application for arbitration shall be submitted, explicitly stating the nature of the dispute and attaching the necessary documents to the application, to the Board of Directors of the Arbitration Board of the Central Chamber of Commerce which shall quickly decide whether the case will be accepted and inform the parties accordingly. If the dispute is to be arbitrated, the Board of Directors will choose three persons and the necessary deputies as arbitrators and advises the parties and arbitrators of the election. According to the nature of the case the Board of Directors may elect only one or more than three arbitrators to decide the dispute.

The arbitrators shall rapidly decide the dispute and give their verdict. The parties to the dispute will be given a respite only when considered necessary.

The parties shall have the right either verbally or in writing

* Publisher, Helsingin Sanomat.

to state their case to the arbitrators before a decision is made. Otherwise the arbitrators may, according to circumstances, request from the parties a written or verbal statement, to summon and hear witnesses and to decide the method of submission of testimonials as they deem proper.

In their final verdict the arbitrators shall determine which party shall pay the expenses of arbitration and also whether and to what extent one party shall be responsible for payment of costs to the other party in the case.

In all other respects the law of April 4th, 1928 on arbitration, as well as the statutes of the Arbitration Board of the Central Chamber of Commerce shall apply.

The Status of Foreign Establishments is the subject of a Revised Model Agreement, proposed by the International Chamber of Commerce (Brochure No. 120) which provides in Article XI as follows:

> "Should difficulties arise in respect of the application or interpretation of the present agreement and affecting one of the Companies covered by its provisions, that Company shall appeal to the Government of the country to which it belongs and the High Contracting Parties must come to an agreement for the solution of the difficulty in question in the spirit of the present Agreement."

A Commentary of the International Chamber on p. 6 reads as follows:

> "This Article leaves the Contracting States entirely free to choose whatever procedure they find to be most suitable for settling differences arising between themselves. It is most important, however, that such procedure should be laid down in advance in the agreement itself, e.g., reference might be made to the International Court of Justice or to arbitral institutions or any other body appointed ad hoc."

Moreover, Article XII of the Revised Model Agreement provides that in the event of nationalization or expropriation of parties belonging to the companies of one of the contracting parties in the territory of another party, appropriate compensation should be given in free transferable currency, and that "the compensatory indemnity shall be fixed by a Committee of independent arbitrators."

Arbitrating A Wage Dispute Case

Jules J. Justin*

The arbitration of a wage dispute case is not an unpredictable process. The elements that constitute it can be analyzed and formulated. The parties know the material, determining factors and their relative importance, and employ them in their every day negotiating sessions. The limits within which the arbitrator will award are not elusive, subjective, nor imaginary. The award is usually far from the unexpected. It seldom falls outside the area of "probable expectancy." This area is the normal resultant product of the parties' negotiating and bargaining, prior to submitting their differences to arbitration.

Although, with increasing frequency, parties to a collective bargaining contract are submitting their wage dispute to arbitrators, some feeling of misgiving still prevails. This attitude of uncertainty and insecurity with respect to the use of the arbitral process to determine a wage dispute arises from two principal sources: one, a lack of definiteness and clarity in the written submission agreement, setting forth the issues to be decided; and two, incomplete, ineffective or faulty proof of the factors and criteria upon which the arbitrator will decide the issues before him.

The first failing stems directly from the contract or submission agreement created by the parties themselves. The wage dispute may arise in the negotiation of a first or renewal contract. More often, it arises under a "reopening" clause in an existing contract. Rarely does the contract or submission agreement set forth standards for the arbitrator's guidance or qualifying limits for his award. On the contrary, the "reopening" provision or submission agreement is often written in general and even obscure terms. Its scope is vague, its meaning uncertain and ambiguous.

Thus, a commonly used clause merely states that "the question of wages" may be reopened by the Union. Others experienced by the writer merely provide for the "adjusting of wage rates"; "reopen negotiations for an upward revision of wage scales";

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reopening "in the event economic conditions make the salaries specified in this contract utterly unequitable"; reopening of "wage items"; "the wage dispute between the parties to be arbitrated"; etc.

At the hearing, the parties wrangle over the interpretation and application of their written contract or submission agreement. The arbitrator must first determine from the language used what their intentions were when the agreement was written. Did they intend to submit to arbitration only the issue of a general, across-the-board wage increase? Or did they intend that other matters which relate to wages, wage benefits and earnings, such as premium pay, additional vacations and holidays, paid rest periods, institution of health and welfare funds, etc., were to be arbitrated? Are new job rates to be set? Is the general increase to be integrated into the wage structure, effecting incentive plans, or shall it be applied as a "cost of living" bonus to present employees only? What about the hiring rates, the minima and maxima of job rates and labor grades? What shall be the effective or retroactive date of any increase or adjustment awarded? To which employees shall it apply?

The resulting confusion and uncertainty are the parties' own doing. They cannot be attributed to the arbitral process as such, much less to the individual arbitrator. The responsibility rests squarely on the contracting parties themselves. The arbitrator's determination of these ancillary problems may very likely fall outside the area of probable expectancy, when the case goes to arbitration. But they are errors of omission, foreseeable and preventable by the parties. They cannot be charged to the vicissitudes of the arbitration case per se.

The second source of difficulty in wage arbitration—incomplete, ineffective or faulty proof—is likewise not chargeable to the arbitration process. While the experienced arbitrator may have the duty of indicating to the parties the kind of proof he deems material, he cannot decide the issue outside of the proof the parties present.

It is a tribute to the inherent value and strength of the arbitral process that even these errors of omission on the part of the parties only rarely make the difference between losing or winning the case. More often, they affect the arbitrator's award within the limits of that area of probable expectancy. Thus, if the arbitrator is convinced that an increase is warranted under the Union's proof, he may be undecided upon awarding, for example, the full amount of the rise in the cost of living or of the "pattern" established in the industry. Whether a lesser

amount will be granted, may depend upon competent proof that the Company offers under the criteria of resulting competitive disadvantage or financial hardship.

There is no established or fixed formula, let alone a blueprint, available to arbitrators for the determination of a wage dispute. Yet, there are certain material or controlling factors and criteria which the parties must be prepared to establish or disprove by evidentiary facts. These factors and criteria may be grouped under the following eight categories: (1) changes in the "cost of living"; (2) improvement in wage earner's standard of living; (3) prevailing wage rates for comparable jobs in the industry or local labor market area; (4) effect of "patterns" or industrywide wage increases; (5) competitive conditions in the industry or local labor market area; (6) levels of current wages and earnings in comparable bargaining units; (7) financial ability or inability to pay; (8) relation between productivity and wage increases.

In addition, there are certain other factors, collateral to the foregoing, which present problems in the particular case and which affect the arbitrator's determination. They are: (9) establishing the effective or retroactive date; (10) method of application or integration into the wage structure of any increase awarded; (11) cost of other contract benefits secured or awarded; (12) relation of labor cost to total cost of production; (13) contractual controls over future changes in wage conditions.

The proof that the parties offer the arbitrator in support or refutation of contentions asserted under the foregoing criteria must be specific, factual, and material. Although difficult of ascertainment at times, their responsibility in this respect cannot, with impunity, be shifted to the shoulders of the arbitrator.

Space does not allow for more than a sampling of the complex problems that present themselves in the wage dispute and of the kind of evidentiary facts an arbitrator needs to arrive at a just determination.[1]

Thus, in calculating the percentage rise of increase in the cost of living for a particular case, the appropriate date and applicable period must first be resolved. In one case, the Union argued for the date negotiations were commenced, rather than the later actual date on which the contract was signed. The Company urged the Consumer's Price Index date of the month

[1] This article is a condensation of a more detailed one on the subject which Mr. Justin is preparing.

next succeeding the contract date. In another case, the Union contended that the applicable period should include the additional nine months consumed in unsuccessful negotiations, after the contract had expired.

Under "reopening" clauses, arbitrators have generally refrained from awarding an increase solely on the "improvement" factor. Where the hiring or job rates of the plant are below those prevailing for comparable jobs in the industry, the "improvement" factor may be relied upon by the Union to meet the Company's proof of inability to pay the full rise in the cost of living or the industry "pattern" increase.

Job titles are usually not material or sufficient evidence to prove or disprove comparability of jobs in the industry or local labor market. Facts showing specific job content, description and operational tasks are minimum requirements for making fair comparisons. Likewise, in asserting or refuting the applicability of an industry "pattern" increase, or the claim of resulting competitive disadvantage, the parties should be prepared to offer facts concerning the nature of the Company's business, its products and market.

A "balance sheet" hardly suffices to convince either the Union or an arbitrator of a Company's "inability to pay." If the claim is asserted, the Company should be prepared to disclose its profit and loss statements, under safeguards which the arbitrator can provide, to protect the confidential nature of such evidence.

Arbitrating a wage dispute is serious business, for the parties as well as the arbitrator. Each has a responsibility to respect the judicial nature of the proceeding and prevent its abuse. Meeting this responsibility will engender greater confidence of the parties in the arbitrable process, and at the same time provide the best safeguard for protecting their interests.

In Memory of Earle W. Corman*

The arbitration movement in the Philadelphia area has suffered a severe loss in the death of Earle Washington Corman, who for the past five years has served as head of the American Arbitration Association's office in that city. Within a short time after "Bill" took over the duties of the office, he breathed life into it and saw it grow to a position of top importance in the Association's chain of regional offices. The phenomenal growth and success enjoyed by the Association in that area, as an efficient servant of arbitration, can be attributed in large measure to the skillful and tireless efforts of Bill Corman.

His thorough conviction of the merits of an organized system for settlement of disputes by arbitration aided him in promoting the service of the Association in industrial relations circles in the Philadelphia area. His devotion to the cause and his indefatigable efforts to maintain exceptionally high standards engendered confidence in the parties of the merits of the system.

By developing a close personal association with his panel of arbitrators and by keen analysis of their abilities and personalities, he was able to prepare lists of those best qualified to serve adequately the particular interests of the parties. Ever cognizant of the idiosyncrasies of human beings, he strove to bring together at the hearings a combination of personalities that would minimize conflict. His unique and colorful expressions, so characteristic of him, not only demonstrated his keen observations of men and situations, but exhibited the ability to relieve tension by interjecting one of his priceless remarks at the right moment.

Few arbiters there were, regardless of their experience, who did not learn something beneficial about the conduct of hearings or the preparation of awards and opinions from Bill. The parties, likewise, profited from his advice and judgment, which

* This tribute was written by a member of the Pennsylvania bar, an arbitrator and educator who has cooperated in the work of the Association since its inception. He prefers to remain anonymous as he knows that the above is the expression of the general feeling of arbitrators and parties in the Philadelphia area (ED.).

he did not pro-offer, but which he graciously gave when it was sought.

Always alert to the responsibilities of his office and with a desire to accommodate the parties, he devoted the last five years of his life unstintingly to developing, in the Philadelphia area, an arbitration service unequalled in any other region in the United States. In his devotion to the cause he frequently traveled the circuit at a great sacrifice to his health and well-being. In his death the parties, the arbitrators and the arbitration movement have lost a true friend, a staunch advocate, an able guide and a wise counsellor.

Free Choice of Arbitrators is Still The American Way in Labor Arbitrations

Joseph S. Murphy *

Under the Rules of the American Arbitration Association, management and labor disputants are privileged in choosing their arbitrators by any method upon which they agree. In order to facilitate their choice, lists are submitted to the parties from a National Panel. They cross off any names to which they object without giving reasons therefor. From the names remaining on the lists, the appointment is made in the order of preference. Should the parties fail to agree upon any of the names submitted, they may request additional lists. When, however, they fail to agree, the Association as the administrator of the Rules is authorized to make the appointment.

An analysis made by the Association shows that only in a small percentage of the thousands of arbitrations do the parties fail to exercise their right of appointment. In 1946, the percentage of appointments made by the Association was 6.6%; in 1947, 3.6%; and in 1948, for the first 8 months it was 5.8% (this includes two summer months during which many arbitrators are unavailable). The average for the three year period is 5.1%.

These low percentages prevail notwithstanding the fact that under some collective bargaining agreements the Association is required to make appointments without submission of lists; and notwithstanding the fact that parties waive their right when the person agreed upon cannot serve, and it becomes important to save time. Also included are instances where the administrator consults directly with the parties before appointment.

When the administrator is called upon to appoint an arbitrator a staff committee of three examines the qualifications, the record of service, his rate of acceptability by parties in previous cases where his name has been submitted, together with an appraisal of his service by tribunal clerks or other observers in those cases in which he has served.

These precautions are taken in order that the element of free choice of arbitrators by the parties may be preserved as far as possible and in order that an impartial person will be appointed who has been frequently acceptable to labor and management in the past. The statistical record of the Association as regards mutual selection by parties is significant proof that its democratic process of selection is eminently practical.

* Director of Panels, American Arbitration Association.

The Anatomy of Labor Arbitration

A Proposed Study Outline

Willard A. Lewis*

Arbitration of labor disputes has received new impetus from the enactment of the Labor Management Relations Act of 1947, and its restudy following the national elections in November 1948. In a period of re-crystallization of national and state labor policy, voluntary arbitration provides an appealing anchorage for adversary interests. Correspondingly, it provides a subject of widening interest to the growing audience of serious-minded students of industrial and labor relations. The problem of classroom presentation thus arises.

The teaching of labor arbitration provides special stimulus to the instructor and the student alike. It is a field wherein the furrows are not yet deep. There is no wide range of texts or of case books but primary and collateral sources, uncollected, offer fertile material. It remains in the province of the teacher to shape these to his ends.

At the outset errors in presentation must be avoided. Somewhere between the pedantic and the personal approach the instructor will strike a responsive chord. Between the footnote and the anecdote the maximum digestibility of the subject-matter will lie. On the one hand, pedantry obscures the essential dynamics of the arbitration process; on the other, unbalanced devotion to relating the personal experiences of the instructor is less than satisfactory. Students of labor arbitration demand an education broader than the particularized biography of the arbitrator-instructor. Indeed, arbitration of labor-management controversies yields its richest rewards to an institutional analysis which takes into account the diverse components of an industrial society. Law, economics, sociology, psychology, technology and folklore are all at play in the collective bargaining process, and beyond.

Yet the practical application of the process may not be properly neglected. Case study will convert the subject into a ready tool for the student. Classroom participation in arbitration

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clinics or "practice arbitrations" will supply an important aid. Moreover, the variations in any probable adult group demand an attention to the latent individual problems. Hence the interest of the individual in the collective bargaining process becomes an element of note and study of particular agreements in particular industries becomes a necessary part of a sound agenda.

To achieve a balanced but flexible application of these observations the following outline is proposed:

I Arbitration as a Function of Democracy: Origins, Growth and Foreign Experience.
II Scope and Types Defined—What Arbitration is Not.
III Your Collective Contract and the Arbitration Clause.
IV Two Fields of Arbitration.
V Arbitration in Action: Machinery and Procedures for Submitting and Deciding Issues.
VI Arbitration Enters the Courtroom: Enforcement of Agreements and Awards.
VII The Rights of Individual Employees under Arbitration Clauses.

This program is designed to inspect and analyze the anatomy of labor arbitration. It is a short course in labor arbitration constructed much as an expanding file wherein each division may be opened to receive whatever contents the circumstances of curriculum permit.

I. ARBITRATION AS A FUNCTION OF DEMOCRACY: ORIGINS, GROWTH AND FOREIGN EXPERIENCE

The concept of labor arbitration as a tool, a technique, a process is early introduced to the student. After group agreement upon a simple working hypothesis as to the definition of labor arbitration, the subject-matter is distinguished from international arbitration and commercial arbitration. Thus legal origins are established. The difference between voluntary and compulsory arbitration is made and attention is directed to experience in other countries. The history of the arbitral process in the various nations is pointed up in terms of the peculiarities of a given context together with the nature and composition of the labor-management groups affected.

A shift to the American experience is effected and a chronology of significant dates in the history of labor arbitration [1] is corre-

[1] A Chronology of American Arbitration, 2 The Arbitration Journal 112 (1948).

lated with a chronology of the growth of collective bargaining itself. In turn, stages in the development of corporate management and trade unions are searched for added background to the rise of the concept of organized arbitration. The common law principles and the features of state and federal arbitration laws are sketched with the current spread of state compulsory enactments outlined. Trends in the use and interpretation of the United States Arbitration Act are indicated.

Attention is then focused on the voluntary nature of the arbitration process and the function it discharges as a technique of economic democracy. The first lecture is brought to a close with a stress on the existence and development of the collective agreement out of which most labor arbitration grows.

II. SCOPE AND TYPES DEFINED—WHAT ARBITRATION IS NOT

Important clarifications are dealt with under this caption. A detailed examination of what arbitration is not creates a thinking atmosphere wherein persistent fallacies are disposed of by the tightening of basic definitions. Scrutiny of the functioning of the arbitration process yields distinctions which set it apart from conciliation, mediation, the investigation of labor disputes, compulsory action by governmental tribunals, and fact-finding board recommendations. It is further separated out from the collective bargaining process itself.

Such analysis quickly leads into a classification of the subject-matter whereby the scope and types of arbitration are related one to the other in such fashion as to provide the student with a working knowledge of the varied patterns of labor dispute adjustment.

The two broad fields of arbitration: disputes as to interests, and disputes as to rights are described, and foreign experiences are briefly reappraised in the light of such categories.

Permanent arbitration, ad hoc, automatic, permissive, and voluntarily-adopted-compulsory arbitration are all explained with whatever degree of elaboration desired. The group is then introduced to the meanings attaching to the quasi-judicial characterization of the arbitration process. Informal comments on the nature of voluntary arbitration by leading authorities are considered and tested against the definitions and classification already established.

With such foundation the necessary and proper circumstances for invoking arbitration and its possible misapplication to some kinds of industrial disputes are discussed.

III. YOUR COLLECTIVE CONTRACT AND THE ARBITRATION CLAUSE

Substantive and procedural features of the contract and its arbitral provisions are studied under this heading. Empirical data is supplied in the form of sample arbitration clauses with a comparative approach laid open in terms of given industries, unions, and other variables. The content and form of clauses under the impact of governmental regulation and statutory enactment are measured against the products of unfettered concerted bargaining. Standard, restricted, limited, open-end and special arbitration provisions are thrown in relief, together with their positions within the four corners of the collective agreement. The relationship to re-opening clauses is underscored and the negotiation of the contract itself is given some attention.

Treatment of the arbitration clause is by way of a breakdown into elements with emphasis upon the particular definition of "disputes."

By reciting the multitude of arbitrable issues which arise under the contract, the importance of proper draftsmanship of the clause is brought home. In this connection, self-defeating litigatious language and the formal "conditions precedent" found in some representative agreements are offered to the group. Finally customary and "ideal" clauses are described in connection with desired solutions.

This session provides opportunity for audience participation whereby personal experiences of individuals under stated contracts may evoke interesting problems in construction and interpretation.

IV. TWO FIELDS OF ARBITRATION

This session would be devoted to a comprehensive presentation of the fundamental differences between the types of arbitration. The one interprets and applies the provisions of an existing contract and defines the rights and obligations of the parties; the other examines and determines the interests of the parties following a breakdown of the collective bargaining process. There would also be discussed that type of arbitration usually administered by the "Impartial Chairman" which may embody a mixture of both the foregoing types.

Public misconceptions regarding these three distinctive processes—all embraced under the general term "arbitration"—are widespread and shared by so many employers and employees that clarification is an imperative necessity before understanding is possible.

V. ARBITRATION IN ACTION: MACHINERY AND PROCEDURE FOR SUBMITTING AND DECIDING ISSUES

Functioning arbitration now becomes the concern of the class. The process and its standard operating procedures command the attention of the instructor.

A detailed examination is made of the types of arbitral authority ranging from single ad hoc arbitrator to the permanent umpire or Impartial Chairman. The variety of tribunals and panels, statutory and otherwise, are explained and their advantages and disadvantages, appropriateness and facility compared.

Methods of selection of arbitrators are investigated and reference is made to the assorted provisions found in private contracts. Governmental, quasi-governmental, and non-governmental guides are consulted. Tenure of office of the arbitrator or the panel members is looked into in respect of a particular grievance system and the various means of compensation are indicated. To round out the problem the qualifications of the arbitrator become a center of discussion.

In describing arbitration in action the function and duties of the arbitrator are outlined, the importance of jurisdiction is dwelt upon, and the power of the arbitrator to make a final and binding award is fixed as the fulcrum of the arbitration process.

Early distinctions as to subject-matter are repeated to open the way to a study of the submission agreement as the method of proceeding with an existing dispute under a contract which included inadequate or no provisions for arbitrating future disputes. The important nature of the submission document and its development are brought out.

Preparation of the case and details of the hearing absorb much of this session. Presentation, rules of procedure, evidence, examination, argument and briefs may or may not be made the subject of extensive discussion. The award itself is finally reached. Findings and Opinion or Decision are then explored with a view to extracting the principles of determination, the kinds of relief, and the attributes of an effective award.

VI. ARBITRATION ENTERS THE COURTROOM: ENFORCEMENT OF PROCEEDINGS AND AWARDS

The ultimate power of the courts to pass on the validity of the collective contract, the arbitration clause, the submission, and the award is now the major concern. Within the framework of common law and the statutory rules for the judicial enforcement of proceedings and awards, jurisdictional contrasts

are high-lighted. Once more basic distinctions as to existing and future disputes are carried forward and the scope and the types of arbitrable controversies which will be given effect by the courts are outlined. Special consideration is given to civil practice codes and their detailed provisions covering arbitration.

From the manner for enforcing arbitration agreements to the manner for confirming, modifying, or vacating the award, the variety of legal situations offers rich materials. Seeking confirmation and reduction to judgment, grounds of challenge to the award, motions to stay the proceeding, seeking correction, modification or setting aside of the award are examined with accent on the occasion for judicial intervention. The problem of the enforceability of foreign awards is touched upon.

In unfolding this subject recourse is had to requirements of the contract language, to the effect of prior awards between the parties, and to the conduct of the arbitrator as well as to citations of leading cases.

Throughout, the areas for the exercise of the arbitrator's authority and the areas reserved for judicial disposition are defined. The lecture ends with the impact of current legislation on the problems under discussion.

VII. THE RIGHTS OF INDIVIDUAL EMPLOYEES UNDER ARBITRATION CLAUSES

A period built around the rôle of the individual employee in the arbitration process serves to draw a wider public into the forum. By emphasizing the individual, the productive meaning of arbitration in daily life is dramatized. The huge stake of both the union member and the non-union member in labor arbitration is made clear, and the rights of the employee irrespective of union affiliation are stressed.

Further, this heading opens the path to study of the great bulk of awards dealing with discharges, layoffs, resignations, seniority rights, transfers, down-grading and similar issues. Problems of special interest as reflected in arbitration awards are given prominence, e.g., the rights of individuals under union security clauses.

On a broader plane, the theory of the collective compact is itself investigated to establish whether the individual employee has an enforceable interest to compel or to stay specific performance of the arbitration clause for his benefit, and the zones of authority within the union are similarly analyzed.

Likewise, the place of the individual in the bargaining unit and the statutory provisions affecting individual settlement of grievances are cited to increase understanding of the arbitration process as it applies to the particular employee.

The series concludes on a summation of the elements which comprise the anatomy of labor arbitration and which make its continued functioning a practical economic and social necessity.

It is to be hoped that effective instruction will prove an aid to effective arbitration.

Mediation and Arbitration under the New York State Board of Mediation in 1947 is a publication of the Division of Research and Statistics of the State of New York's Department of Labor (Number B-12, November 1948). It deals especially with Arbitration in Forming Contracts and reports (Table 14) that "almost two-thirds of the cases which come to the Mediation Board for arbitration are settled without reaching the point at which a binding award is issued." . . . *A Conference on Labor Arbitration* was held under the auspices of the Labor Relations Council of the Wharton School of Finance and Commerce in Philadelphia, on November 12, 1948. Its principal topics were Arbitration under Terms of Existing Agreements, Voluntary Arbitration of Terms of Future Agreements, Experiences in Voluntary Arbitration, and Peaceful Settlement of Public Emergency Disputes. . . . A notable contribution to American labor-management relations is the *Industry-Wide Collective Bargaining Series*, fifteen booklets by well-known authorities, published under the editorship of George W. Taylor. . . . The *American Paper and Pulp Association* reported in its Statistical Summary, Vol. 24, No. 9L, that of 100 labor contracts 86 contain arbitration clauses, of which 61 provide for a tri-partite board. . . . *15 Case studies* on causes of industrial peace under collective bargaining agreements are to be published by the National Planning Association in Washington, D. C. Three have appeared; Crown Zellerbach, Libbey-Owens-Ford Glass Company, Dewey and Almy Chemical Co. . . . *A Symposium on Arbitration Issues* appeared in Labor and Nation, of the Inter-Union Institute, N. Y., Vol. 4, No. 4, including an article by Harry Shulman on "Broader Powers for Arbitrator." This author also delivered an address on *Settlement of Labor Disputes* before the Association of the Bar of the City of New York which was followed by a general discussion of arbitration problems. . . . *Industrial Arbitration*, a course given by J. Noble Braden, Tribunal Vice-President, AAA, as Adjunct Professor of Industrial Relations at New York University Graduate School of Business, discusses various types of contractual arbitration clauses and procedural questions. In a series of "workshop cases," training in the actual process of arbitration is offered. . . . Another course on *Arbitration-Practice and Procedure* is being given at the Illinois Institute of Technology in Chicago by John F. Sullivan, AAA Regional Manager; Joseph S. Murphy, AAA Educational Director, is presenting a year course on *Arbitration Methods* at St. Peter's College, Jersey City, N. J.

Arbitration and Student Government

*George S. Queen**

For several years there has been considerable interest in giving arbitration a place in teacher education at Brockport State Teachers College. After the American Arbitration Association played host to representatives of the faculties of the Teachers Colleges of New York State, in February, 1945, this interest became more conscious and objective. An assembly program attempted to dramatize the idea for the entire student body. The president of the college, Dr. Donald M. Tower, encouraged instructors in both the College and the Campus School to teach the practice of arbitration as a peaceful means of settling disputes. A College Arbitration Committee was established, consisting of representatives from the student body and the faculty and a number of local townspeople were invited to serve as members of a panel of arbitrators.

When a new Student Faculty Association was formed at Brockport in 1946, the constitution of the organization provided for arbitration machinery. This provision in a document of student self-government led in May, 1948, to the settlement of a bona fide dispute by means of arbitration in actual practice.

Under the constitution of the Student-Faculty Association at Brockport, the election of student officers to the Council of the Association occurs each spring. One of these officers of the Council is Student Director of Athletics, a very important post, since Brockport boasts a special department for preparing teachers of physical education and health.

In April, 1948, the committee on elections discovered that the Department of Physical Education had widely revised the constitution of its Athletic Board of Controls, its own committee set-up for student participation in athletic affairs. It should be emphasized that the Department intended that these revisions should be voted upon as a group by the Student-Faculty Association, and, further, that the amendments ratified should not become effective until September, 1948. The members of the Council's committee on elections, however, seeing that one of the changes referred to above was concerned with the qualifications of the Student Director of Athletics, singled out this

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clause, lifted it from its context and submitted it, along with certain other proposed amendments to the constitution of the Student-Faculty Association, for ratification by the membership of that body. The aim of the election committee was that the new Student Director of Athletics should be elected on the basis of the new qualifications for that office.

The proposed amendment was duly announced and posted, along with others, in accordance with the Student-Faculty Association's election procedure. Some members of the Association called attention to the fact that, under the qualifications as set forth in the amendment, only one candidate would be eligible for the post of Student Director of Athletics; specifically, the incumbent student member of the Athletic Board of Controls. The voting took place, nevertheless, the election officers assuring the few dubious voters that the proposed amendment would not take effect until September, 1948. The proposal was ratified in due form.

Shortly afterward, nominations for student officers of the Student-Faculty Association Council for the year 1948-1949 became the center of student interest. Two or more "parties" began to prepare slates of candidates. Enthusiasm mounted. Then one "party" discovered that the only candidate who apparently could meet the qualifications for Student Director of Athletics, the aforementioned member of the Athletic Board of Controls, was already slated on the opposing "ticket." This situation, it was claimed, was intolerable, distinctly undemocratic—and, of course, un-American. A rival candidate for the athletic post must be "put up." A student, whom we shall call Jones, was finally prevailed upon to file his petition of candidacy. The processing committee of the Council rejected Jones' petition on the ground that he did not and could not meet the requisite qualifications as laid down in the newly adopted amendment to the constitution of the Association. In the Council, a heated student debate took place. Jones' partisans held that the new amendment which contained the excluding qualifications in question was not intended to take effect until the following September, anyway. Other members of the Council, including the president and faculty representatives, pointed out clearly that the new amendment was already a part of the constitution of the Association; and was in effect from the moment of its ratification, inasmuch as it was specifically provided in their constitution that unless otherwise stated an amendment took effect immediately; and the amendment in question had not contained an effective date. Therefore, argued the student

president, regrettable as the fact might be, only one person met the legal qualifications for the post of Student Director of Athletics, and that person was not Jones. Jones' friends refused to accept this "legal," this "technical" argument. Some students, they said, had been assured at the voting booths that the amendment would not take effect until September; everybody knew it was "meant" to take effect at that time; and besides, they "felt" that in such case constitution and technicality should be waived to secure justice. They insisted on bringing the matter to a formal vote in the Council, on the simple issue of Jones' eligibility to run. With many members of the Council abstaining, the issue was decided in Jones' favor by a vote of eight to two. And in the regular election he was elected Student Director of Athletics.

"Eternal vigilance," said Madison, "is the price of liberty." And it is the glory of democracy that watchers of governmental acts and policies can not only watch, but they can also cry out. In this instance two students and one faculty member challenged the action of the Council as being unconstitutional. "We have no feeling against this candidate," their petition read in part, "and this protest is being registered, not to remove him from office, but rather to focus attention on an act of the Council which we feel is a serious and dangerous precedent. If the Council is allowed to set the precedent of ignoring the S.F.A. constitution when they see fit, then the Council ceases to be the representative voice of the Association members." In brief, the three guardians of student democracy petitioned the Council to submit the question "to the Arbitration Committee or any other desired means."

The Council, somewhat chastened, agreed to submit the problem to the College Arbitration Committee, as suggested in the Association's constitution: "The College Arbitration Committee shall . . . in the event that a dispute arises over the interpretation of this constitution, cause this dispute to be arbitrated under their regulations." The constitution further provided: "Members of the College Arbitration Committee shall be the presidents of the four classes and one member of the faculty elected by the faculty."

On the following day, seven days before the final examinations were scheduled to begin, the president of the Council informally submitted the case to the faculty member of the College Arbitration Committee. It should be noted here, that no written "submission" limited the scope of the Committee's task in

this case. After some discussion of the principles and procedures of arbitration, the Committee members briefed each other on what they individually knew of the case before them. Gradually, out of the haze of ideas, a plan of action was formulated, nebulously at first, then more clearly and surely as the precious time slipped by. First, the Committee must organize itself and draw up its own regulations; second, the problem must be defined; third, the procedure in collecting evidence must be decided upon; fourth, the evidence must be evaluated; fifth, awards or decisions must be written; and sixth, a report must be submitted to the Council. After some discussion, the following procedure was decided upon: 1) to hold a formal arbitration hearing, with the Chairman of the Committee presiding; 2) to formulate a set of questions so phrased as to determine the Committee's jurisdiction over the case, which jurisdiction hinged upon the existence of a "dispute" in the Council over the interpretation of the constitution of the Student-Faculty Association; 3) to collect oral evidence in the hearing, and also to invite all parties to the dispute, and other interested parties, to submit written statements at a later time. This plan of procedure was acted upon, the hearing was conducted in an atmosphere of judicial seriousness, depositions were collected, and within forty-eight hours of receiving the case the Committee had a mass of evidence at hand.

Summarized, the award when completed contained the following points or decisions: 1) The Council's action in declaring Jones eligible for candidacy was unconstitutional; 2) the amendment which was the cause of the dispute was null and void, having been ratified in an election marked by voting irregularities; 3) the election of Jones was invalid. A recommendation was further made that a mass meeting of the membership of the Student-Faculty Association be called for the purpose of filling the office from which Jones was removed, for it was necessary, for financial reasons, that a legally elected Student Director of Athletics be already installed in office when school opened in September.

The really significant thing about it all was this, that arbitration, in its first trial at Brockport, had worked. In solving a bona fide, and not a trumped-up dispute, it had worked well. It would have worked much better if more people had been more fully informed concerning its ideals, principles, and practices. Even so, valuable experience was gained and precedents were set for the guidance of future Arbitration Committees at the College.

Review of Court Decisions

This Review covers decisions in civil and commercial as well as in labor-management cases. They are arranged under the main headings of: *The Arbitration Agreement, The Arbitrator,* and *The Award.*

I—THE ARBITRATION AGREEMENT

Compulsory arbitration of labor disputes in Michigan was considered unconstitutional, the Chief Justice of the Supreme Court of Michigan stating that "the merits of compulsory arbitration over collective bargaining and voluntary arbitration are currently the subject of discussion in legislative halls, university classrooms and the public press." The court dealt only with the provision for arbitration by a board of which a circuit judge, designated by the presiding circuit judge of the State, shall be a chairman with power to make a binding determination of the issues involved. The court held the Act invalid since it attempted to confer upon a judicial officer non-judicial powers and duties. *Local 170, Transport Workers Union of America, C.I.O. v. Gadola,* 34 North Western Reporter 2d 71.

Invalidity of agreement for organization of corporation, in violation of Sec. 27 of General Corporation Law, affects also employment contract made pursuant to that agreement and thus makes arbitration clauses in both agreements invalid and unenforceable. *Abbey v. Meyerson,* 274 App. Div. 389.

Separation agreement provided for determination of payment by arbitrator if substantial change of financial position of party would constitute a hardship and be unfair or inequitable. There is no arbitrable issue presented when no proof of change of financial position is submitted. *Rubio v. Rubio,* N.Y.L.J., December 7, 1948, p. 1424, Eder, J.

Effect of changes allegedly made by party to contract under bought and sold notes should be argued before arbitrators. *Waterman-Leder Corp. v. Buffalo Frosted Foods, Inc.,* N.Y.L.J., September 22, 1948, p. 527, Cohalan, J.

Provision for arbitration cannot be used to compel arbitration of matters which do not concern "grievances arising under an existing contract but relate rather to the making of an entirely new and different agreement to follow upon expiration of the existing one." *Marseillaise French Baking Co., Inc. v. O'Rourke,* N.Y.L.J., November 24, 1948, p. 1270, Levy, J.

Clause in partnership agreement providing for arbitration of any dispute between the parties "for any reason whatever" embraces also controversy as to the conduct of partnership. *Kaplan v. Reger,* N.Y.L.J., November 4, 1948, p. 1032, Botein, J.

Recision of contract because of misrepresentation may lead to temporary injunction to stay arbitration since sec. 1458 C.P.A. is not an exclusive remedy and does not deprive the court of its power to grant injunctions in actions. *Wenig v. Geddes*, N.Y.L.J., November 22, 1948, p. 1237, Pecora, J.

When notice to terminate collective bargaining agreement was not given as expressly provided in contract, arbitration clause was enforceable since agreement was automatically renewed under its terms. *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 536 v. General Ice Cream Corporation*, 15 Conn. Sup. 480 (Superior Court of Hartford County).

Termination of sub-lease and its effect on operation of arbitration clause was considered in *Schafer v. Holt*, N.Y.L.J., October 25, 1948, p. 903, Steuer, J.

Employment contract whereby stockholder should devote "only such time to the business of the corporation as he in his sole judgment shall deem necessary" was not considered invalid as being illusory since he had not to make his decision in bad faith or arbitrarily; the dispute was thus held arbitrable and stay of arbitration denied. *Seymour Grean & Co., Inc. v. Grean*, 82 N.Y.S. 2d 787 (App. Div. First Dept.).

Partnership agreement providing for arbitration of "all disputes and questions whatever" was enforced by Philadelphia County Court in a dispute regarding the exercise of an option to devote full time to the business at an equal salary. The arbitration was not affected by the provision of the Arbitration Act of 1927 which specifically excepts contracts for personal services from its scope since the agreement "concerns partners who no doubt personally try to service their own ends and those of each other, but 'personal services' as an artistic phrase, requires the idea of master and servant." *Couzens v. Wachtel*, Philadelphia Legal Intelligencer, October 21, 1948.

Time-limit for presentation of claim is a matter to be considered by the arbitrators. *Tuttman v. Kattan, Talamas Export Corp.*, 274 App. Div. 395, 83 N.Y.S. 2d 652.

North Carolina contract with a Nicaraguan exporter providing for arbitration in New York under the rules of the Inter-American Commercial Arbitration Commission was held enforceable since agreement relates to the law of remedies which are governed by the law of the forum (New York) though North Carolina Statute does not recognize enforceability of agreements to arbitrate future disputes (see this *Journal*, 1947, p. 185). An order denying to stay arbitration (189 Misc. 273) was unanimously affirmed (272 App. Div. 801) and this order was confirmed by the Court of Appeals of New York. A writ of certiori was denied by the U.S. Supreme Court. *Gantt (Southland Supply Co.) v. Filipe y Carlos Hurtado & Cia, Ltda.*, 297 N.Y. 433.

Vacation pay constitutes part of employees' wages and is thus arbitrable issue under collective bargaining agreement providing for arbitration of wage disputes. *Brampton Woolen Co. v. Local Union 112*, 17 U.S. Law Week 2211 (Supreme Court of New Hampshire).

Omission by president of corporation to designate his office after his signature of contract does not detract from the binding effect of agreement including arbitration clause when president had authority to accept contract on behalf of corporation. *Rosedale Fabrics, Inc. v. Man-Tel Fashions, Inc.*, 82 N.Y.S. 2d 191.

Clause in service agreement between advertising agency and customer providing for arbitration "in case of disagreement" does not cover, after its termination, arbitration of disputes as to compensation and agency's right to indemnity against future claims. *Perm-Aseptic Corp. v. Mortimer Lowell Company, Inc.*, 82 N.Y.S. 2d 832 (App. Div. Second Dept.).

Action to recover damages for malpractice was not stayed since "there is no satisfactory showing of the existence of a reciprocally enforceable written contract of the parties containing the claimed arbitration clause." *Dwyer v. Biddle*, 83 N.Y.S. 2d 138 (App. Div. Second Dept.).

Successor tenant who was not a party to an arbitration agreement but who will be ultimately affected by the award, may not maintain an action in equity to set aside an award. He should have applied to the court for leave to intervene in and be made a party to the arbitration. *Flora Fashions, Inc. v. Commerce Realty Corp.*, 80 N.Y.S. 2d 384.

Presentation of theatrical attraction during lay-off period or between seasons does not constitute arbitral issue under provision for arbitration of any controversy with respect to interpretation of agreement or breach of performance thereof, since "the mere assertion by a party of his own interpretation clearly contrary to the plainly stated words used cannot make the construction thereof into an arbitrable issue." *Dunham v. Leventhal*, 81 N.Y.S. 2d 586.

Failure to honor valid claim to damages was declared grievance under collective bargaining agreement. Since no opportunity was afforded to employer to consider the nature or the extent of the damage or to confer upon it with the union's representative, arbitration was stayed to permit compliance with grievance procedure. *Herzfeld & Stern v. Financial Employees Guild, Local 96, United Office & Professional Workers of America, CIO*, 81 N.Y.S. 2d 532.

Rights under recision of contract pursuant to Sec. 150 (1) of N.Y. Personal Property Law (providing that upon a breach of warranty by the seller, the buyer may rescind the contract, return the goods and recover the price paid) are necessarily waived by agreement to submit to arbitration. *H. Feld Company v. Horch-Oppenheimer, Inc.*, 192 Misc. 325, 80 N.Y.S. 2d 389.

Cancellation of contract containing arbitration clause is issue to be decided by the arbitrators, referring to *Matter of Lipman*, 289 N.Y. 76, 146 A.L.R. 1088. *Peg O'Nair Fashions, Inc. v. Tanbro Fabrics Corp.*, N.Y.L.J., September 22, 1948, p. 527, Schreiber, J.

Issue of existence of contract providing for arbitration does not constitute triable question when also raised in a suit already pending in another court. *Schnur v. Aster*, N.Y.L.J., October 10, 1948, p. 714, Steuer, J.

II—THE ARBITRATOR

Arbitrator is disqualified as "person who directly or indirectly is connected or associated in interest or otherwise with a landlord or tenant" under the Commercial Emergency Rent Law, since he was the husband of the legal assistant to the attorney for the landlord. *Empire Plexiglass Corp. v. Levitt Corp.*, 192 Misc. 251, 77 N.Y.S. 2d 85.

Joint venture for division of profits provided for arbitration of "any differences arising between the parties." The court in directing arbitration held that the question of failure to comply with monthly accounting was solely for the arbitrators to decide. *Davis Stewart Commercial Corp. v. Strathcona Co., Inc.*, 81 N.Y.S. 2d 729.

Arbitrator under submission to determine crop damage under hail insurance policy has to be unbiased and uninterested person, a qualification which was not complied with by arbitrator in insurer's employ during arbitration. *Orr v. Farmers Mut. Hail Insurance Co. of Missouri*, 201 South Western Reporter 2d 952 (Supreme Court of Missouri).

Disqualification of arbitrator does not follow from his disclosure during arbitration that he had had business relations with a subsidiary of one of the parties to the arbitration and from his offer to disqualify himself. *Janet Shops, Inc. v. Tweens, Inc.*, 82 N.Y.S. 2d 185.

Umpire as a member of board of appraisers to determine the amount of loss or damage caused by fire cannot be appointed by court when the insured has not rendered to the insurer written proof of loss as expressly provided in policy. *Boston Ins. Corp. v. A. H. Jacobson Corp.*, 33 North Western Reporter 2d 602 (Supreme Court of Minnesota).

Oath of arbitrator is waived if the parties have continued with the arbitration without objection to the failure of the arbitrator to take the oath (sec. 1455 C.P.A.). *Vincent v. Garment Center Fixture Co., Inc.*, N.Y.L.J., November 22, 1948, p. 1234, Botein, J.

III—THE AWARD

Computation to be made week by week to carry arbitration award into effect does not render award ineffective if weekly computation was merely an accounting calculation. *Hunter v. Proser*, 274 App. Div. 311, 83 N.Y.S. 2d 345, in eliminating the appointment of a referee as directed by the order digested in this *Journal* 1948 p. 120.

Kentucky contract for the purchase of Brazilian caroa fibre providing for arbitration in New York "in the usual manner" did not give consent to N.Y. Court's jurisdiction (65 F. Supp. 601, D.C. Kentucky; see this *Journal* 1946 p. 226). The arbitrator's power to act ceased upon the making of the award

(6 Williston, Contracts sec. 1927, Rev. Ed. 1938). A second award was held unenforceable since the claim for damages became merged into the first valid award. *Jackson v. Kentucky River Mills, Inc.*, 77 F. Supp. 53 (D.C., S.D. N.Y.), affirmed 170 F. 2d 703.

Validity of award is independent of fact that no motion to confirm the award was ever made. *Abel v. Todd Shipyards Corp.*, N.Y.L.J., October 11, 1948, p. 750, McNally, J.

Fair rental arbitration was considered invalid when in contravention to statutory arbitration provisions of Commercial Emergency Rent Law (Ch. 314 of the Laws of New York 1945, as amended; see this *Journal* 1948 p. 85 and 121). *Citadel Holding Corp. v. Seeley*, N.Y.L.J., October 1, 1948, p. 651, Dickstein, J.; *Friedman v. Newport Avenue Realty Corp.*, N.Y.L.J., October 11, 1948, p. 735, Nova, J.

Sufficiency of evidence before arbitrator may not be reviewed by court. Said the court: "If that could be done, arbitration would lose its efficacy because the parties could be brought into court in every matter. Arbitration is a means for eliminating court action." *Lewis v. Schuyler Mgt. Corp.*, N.Y.L.J., September 27, 1948, p. 587, Pecora, J.

Collateral attack based on alleged fraud in arbitration can not be maintained in action to vacate court order which confirmed award, since fraud, if any, relates to the arbitration and not to the court order. Such fraud may be corrected only in the manner provided in the Arbitration Statute (art. 1462 C.P.A.). *Umansky v. Sheftman*, N.Y.L.J., June 18, 1948, p. 2309, Levy, J.

Enforcement of award rendered in Boston, Mass., to reinstate discharged employees is not mandatory upon N.Y. Supreme Court, since the arbitration statute "confers no authority upon the court to grant to an award in arbitration, procured in Massachusetts, the standing of a judgment of the courts of this state." An application to vacate the award was likewise refused since such application should be made within the jurisdiction wherein the award was rendered. *United Electrical, Radio & Machine Workers of America v. General Electric Co.*, 83 N.Y.S. 2d 768.

Supplemental awards possible if expressly mentioned in arbitration rules referred to, such as Rule 19 of the Arbitration Rules of the National Federation of Textiles. *Hudson Fabrics, Inc. v. Susan Joan Frocks, Inc.*, N.Y.L.J., September 21, 1948, p. 511, McNally, J.

Award in an arbitration held in Poland on the proceeds of a joint venture which was not reduced to judgment, does not have the effect of a judgment of a court. *Schoenlank v. Frohwirth*, 80 N.Y.S. 2d 318.

Recovery of award rendered in Seattle, Washington, under submission to arbitrators appointed by food associations, pursuant to the Washington Arbitration Statute of 1943, cannot be denied by Idaho Court for lack of jurisdiction. *S. H. Cramer & Co., Inc. v. Washburn-Wilson Seed Corp.*, 195 Pacific Reporter 2d 346 (Supreme Court of Idaho).

Alternative award on the operation of a milk route was adopted by the Appellate Division in modifying the decision digested in this *Journal* 1948 p. 121. *Delaware County Dairies, Inc. v. White,* 274 App. Div. 826, 80 N.Y.S. 2d 392.

Contingent fee of attorney who prosecuted client's claim against former employer through arbitration, entitles only to percentage of the recovery as measured in the award and does not relate to a percentage of counter-claim interposed by former employer and denied by arbitrator. *Richland v. Bramnick,* 81 N.Y.S. 2d 735.

Damages for laundry driver's breach of negative restrictive covenant in employment contract may be awarded by Impartial Chairman under clause whereby "any and all matters in dispute" should be submitted to arbitration. *Utility Laundry Service, Inc. v. Sklar,* 83 N.Y.S. 2d 861.

FOREIGN ARBITRATION CASES

CANADA

Compensation for land taken for public school was subject of an arbitration where the Supreme Court of British Columbia held that the court has no right to weigh the reasons given by the arbitrators for the purpose of deciding whether they were right or wrong in awarding costs in the manner set forth in the award, stating: "The courts have always been inclined to uphold rather than set aside awards" (p. 525). *In re Arbitration between Board of School Trustees of Surrey School District No. 36 and Slank,* (1948) 1 Western Weekly Reports 514.

Enforcement of mechanics' lien is not prevented by arbitration clause in construction contract since agreement to arbitrate is not considered a waiver of this right. *Great Western Electric Limited v. Housing Guild Ltd.,* (1947) 2 Western Weekly Reports 1023 (Br. Columbia).

Agreement on dissolution of partnership providing for arbitration of distribution of assets does not necessarily entail stay of court action when auditors named as arbitrators are now in the position of being witnesses as to the facts in the matter on which they would be required to arbitrate. Said the court: "Neither party can be said to have agreed to arbitrate under such altered conditions." *Chapelle v. Watt,* (1947 Western Weekly Reports, Vol. 1, p. 349, aff'd Vol. 2, p. 240 (Supreme Court of Alberta).

Partnership agreement providing for arbitration was considered wide enough to embrace counterclaim since "it is prima facie the duty of the court to allow the agreement to govern." *Madorsky v. Zelnika,* (1947) 1 Western Weekly Reports 654 (Supreme Court of Alberta).

Publications

Peaceful Settlement. A Survey of Studies in the Interim Committee of the United Nations General Assembly is the title of a comprehensive analysis by James Nevins Hyde, published in No. 444 of *International Conciliation*, of the Carnegie Endowment for International Peace. The following issue (No. 445 of November, 1948) includes a lecture on "Peaceful Settlement of Disputes" delivered by Alexandre Parodi, Ambassador of France and Permanent Representative of France to the United Nations. . . . *International Arbitration in Pan American Developments* is the title of an article by Josef L. Kunz in the December 1948 issue of Texas Law Review (Vol. 27, p. 182-214, with 84 well documented notes). The author had contributed to the Fall 1948 issue of the Arbitration Journal an article on the Pact of Bogota. . . . *Jurisdiction of the Federal Courts Under the United States Arbitration Act* is dealt with in a comment by William H. Vaughan, Jr., in Texas Law Review, Vol. 27, p. 218-231 (December 1948), including further references in 82 notes . . . *Predictability of Result in Commercial Arbitration*, a note in Harvard Law Review, Vol. 61, p. 1022-1033, is the result of an extensive survey of AAA cases and of responses of 40 lawyers questioned on their practice before AAA; the interesting documentation in 95 notes refers to case files, court decisions and pertinent legal articles. . . . *Selected Materials and Cases on Labor and the Law*, issued by the Division of University Extension of the University of Illinois, Urbana, Ill. includes reprint of an article by George W. Taylor "The Arbitration of Labor Disputes" from the Winter 1946 issue of the Arbitration Journal . . . *Case Law or "Free Decision" in Grievance Arbitration* is the topic of an interesting note which appeared in the November 1948 issue of Harvard Law Review (Vol. 62, p. 118-126).

Conquest of Peace, by Paul Reiwald, is the title of an interesting book which appeared in the French language in Geneva and in the German language in Zurich and New York (Europa Verlag 218 pp.). It presents viewpoints of modern psychology of the masses with respect to basic principles of international cooperation and elimination of aggressive activities.

Dictionnaire Juridique Anglais-Francais by Raoul Aglion, New York, Brentano's, 1947, 264 pp., $7.50 is a valuable and much needed publication, an indispensable tool to overcome the many difficulties in the appropriate translation of legal terms and concepts of the English and French languages.

The Export Trade. A Manual of Law and Practice, by Clive M. Schmitthoff (London, Stevens & Sons, 1948, 393 pp., 17s6d), a valuable and well documented survey of foreign trade operations, includes in Chapter 24: Arbitration and Litigation a description of British arbitration facilities, referring on p. 294 to the recent agreement between the London Court of Arbitration and AAA.

Documentation

ECONOMIC COOPERATION AGREEMENTS

The Economic Cooperation Agreements between the United States and each recipient country under the Marshall Plan (Public Law 472, 1948) provide in Article X: "Settlement of Claims of Nationals" the following:

1. The Governments of the United States of America and . . . agree to submit to the decisions of the International Court of Justice any claim espoused by either Government on behalf of one of its nationals against the other Government for compensation for damage arising as a consequence of governmental measures (other than measures concerning enemy property or interests) taken after April 3, 1948, by the other Government and affecting property or interests of such national, including contracts with or concessions granted by duly authorized authorities of such other Government.

It is understood that the undertaking of the Government of the United States of America in respect of claims espoused by the Government of . . . pursuant to this Article is made under the authority of and is limited by the terms and conditions of the recognition by the United States of America of the compulsory jurisdiction of the International Court of Justice under Article 36 of the statute of the Court, as set forth in the declaration of the President of the United States of America dated August 14, 1946. The provisions of this paragraph shall be in all respects without prejudice to other rights of access, if any, of either Government to the International Court of Justice or to the espousal and presentation of claims based upon alleged violations by either Government of rights and duties arising under treaties, agreements or principles of international law.

2. The Governments of the United States of America and of . . . further agree that such claims may be referred, in lieu of the Court, to any arbitral tribunal mutually agreed upon. It is understood that the undertaking of each Government pursuant to this paragraph is subject to and limited by the terms and conditions of existing arbitration treaties, conventions or other agreements, particularly any provisions respecting the functions of the Senate of the United States of America and the . . . Parliament.

3. It is further understood that neither Government will espouse a claim pursuant to this Article until its national has exhausted the remedies available to him in the Administrative and Judicial Tribunals of the country in which the claim arose.

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PUBLICATIONS OBTAINABLE THROUGH THE AMERICAN ARBITRATION ASSOCIATION*

AMERICAN:

Sturges: Commercial Arbitrations and Awards, pp. 1082, $15.00
Kellor: Arbitration in Action, pp. 412, $3.50
Code of Ethics for Arbitrators
Science of Arbitration; Arbitration as a Business Tool; Lawyer's Place in Arbitration
Commercial Arbitration Rules
Kellor: American Arbitration, Its History, Functions and Achievements (Harper & Brothers, New York, 1948), pp. 262, $3.00

Blue Book of American Arbitration 1948
Voluntary Labor Arbitration Rules
A Guide to Labor Arbitration Clauses
How to Select an Arbitrator
Labor-Management Arbitration Letter
Toward Effective Arbitration

INTER-AMERICAN:

Kellor and Domke: Western Hemisphere Systems of Commercial Arbitration
47 Questions and Answers
Blue Book of Inter-American Commercial Arbitration
Rules of the Inter-American Commercial Arbitration Commission (English and Spanish)
Monthly Bulletin

CANADIAN-AMERICAN:

Claxton, Commercial Arbitration under Canadian Law
Canadian-American Commercial Arbitration Facilities—Rules of Procedure

INTERNATIONAL:

International Year Book on Civil and Commercial Arbitration, ed. by Nussbaum, pp. 418, $1.50.
Kellor and Domke: Arbitration in International Controversy
Practical Hints on International Commercial Arbitration, International Chamber of Commerce, Court of Arbitration
Rules of Conciliation and Arbitration, International Chamber of Commerce
Foreign Trade Arbitration Facilities and Services
International Arbitration News (bi-monthly publication)

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* Unless otherwise noted, literature is available without charge.